TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. 615

DANNY ESCOBEDO, PETITIONER,

v.

ILLINOIS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

PETITION FOR CERTIORARI FILED JULY 1, 1963
CERTIORARI GRANTED NOVEMBER 12, 1963

SUPREME COURT OF THE UNITED STATES

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INDEX

[fol. 1]

IN THE SUPREME COURT OF ILLINOIS

May Term, A.D., 1962

No. 36707

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error

vs.

DANNY ESCOBEDO, Plaintiff in Error

Writ of Error to the Criminal Court of Cook County

Honorable Fred W. Slater, Judge Presiding

Abstract of Record

INDICTMENT

Indictment for Murder where in the Grand Jurors present that one Benedict DiGerlando, one Grace Valtierra, one Robert Chan, and one Danny Escobedo on the 20th day of January, 1960, in the County of Cook and State of Illinois, unlawfully, feloniously, willfully, and of their malice aforethought made an assault in and upon the body of one Manuel Valtierra, discharged and shot off, to, against, towards and upon said Manuel Valtierra a certain pistol called a revolver, then and there charged with gunpowder and divers leaden bullets, then and there had and held in their hands, and struck, penetrated, and wounded said Manuel [fols. 2-7] Valtierra in and upon the back and body with one of said leaden bullets, giving to said Manuel Valtierra divers mortal wounds of which said Manuel Valtierra thereafter died on January 20, 1960 in the County of Cook and State of Illinois.

* * * * * * *

[fol. 8] HEARING ON MOTION TO SUPPRESS

Hearing on motion to Suppress on September 16, 1960 which exclusive of caption and comment of the Clerk, read as follows:

"Mr. Bellows: I am ready to proceed on my motion to suppress the alleged confession made by the defendant Chan; if the Court please.

Mr. Wesolowski: Your Honor, in that regard, the State is ready as to the defendant Chan, and as to the other two defendants, DiGerlando and Escobedo, we are ready to proceed today. However, I must advise the Court, again, that Lieutenant Flynn, Captain Flynn, who is a witness in this case, he was deputy Chief of Detectives at the time this case was investigated, and he was present during—

The Court: Where is he?

Mr. Wesolowski: He is on vacation. He will be back Monday. Now, I believe that we could proceed today and conclude on Monday. I don't think there would be any time wasted or any inconvenience on witnesses, or the Court, by starting today, even though Captain Flynn is not here at the present time.

[fol. 9] I would also like to ask the Court whether or not the motions as to each of the defendants in this cause—there is a motion to suppress the confession, and while the cases have been severed for trial purposes, as far as the motion to suppress the confessions, I respectfully request the Court that the motions be tried together.

Mr. Bellows: I am going to object to that, if the Court please. The problems are different and I don't want to confuse my record with the record of the proceedings of any other defendant, if the Court please.

Mr. Wesolowski: Your Honor, I believe that the test should be whether there are antagonistic defenses.

The Court: Could the attorneys for the other defendants stand by and could they stipulate that the testimony, certain testimony on their motion would be the same as given on this motion? Otherwise they would have to be here and have a right to cross-examine.

Mr. Bellows: The State has the burden of making out a case that these statements were taken lawfully, on a motion made to suppress, but I don't see how you can combine all

of them together. The record would become confused in the event it was necessary to take the matter up. I would strenuously object to including any other defendant in my motion to suppress.

The Court: I think we will take it singly. It will take a [fols. 10-14] little time, it will be burdensome but it has to be.

Mr. Crane: Judge, the case was put over to this morning because of the absence of Captain Flynn, the other day. They tried to get him and he wasn't available. Rather than try my situation piece-meal I am faced with this situation. I am going to trial Monday morning before Judge Covelli in another case. I don't want to be obstreperous in any manner.

The Court: We will start to proceed on the Robert Chan matter.

Mr. Cane: All right.

The Court: We certainly won't get to it today. We will proceed on the Chan matter today so we will be doing something today. I would suggest then that DiGerlando and—who represents Escobedo?

Mr. Novit: I do, your Honor.

The Court: They still have the Public Defender down here. What is your attitude?

Mr. Novit: Well, I'll go right after Mr. Bellows.

The Court: All right, we'll hold the others on call for Monday.

. . . . . .

[fol. 15] CONTINUATION OF HEARING ON MOTION TO SUPPRESS

Continuation of Hearing on Motion to Suppress, on September 19, 1960, which exclusive of the caption and introductory comments began with the stipulated testimony of attorney Warren Wolfson. The stipulated testimony of Warren Wolfson began with a direct examination by Mr. Bellows as follows:

"Q. Have you been sworn?

A. Yes, sir.

Q. Will you state your name, please?

A. Warren Wolfson.

Q. Spell your last name?

A. W-o-l-f-s-o-n.
Q. Where do you live, Mr. Wolfson?
A. 2150 Lincoln Park West.
Q. What is your business or profession?
A. I am an attorney.
[fol. 16] Q. You are admitted to practice law in the State of Illinois, are you?
A. Yes, sir.
Q. Directing your attention to the 30th day of January, 1960, did you at that time represent a person by the name of Robert Chan?
A. Yes, sir.
Q. Do you see Robert Chan in the court room?
A. Yes, sir, he is sitting right there. (Indicating)
Q. Now, did you have occasion on January 30, 1960, to go to the detective bureau?
A. Yes, sir, I did.
Q. What time of the day or night did you arrive there?
A. Approximately 10:30 at night.
Q. When you arrived at the detective bureau, where did you go?
A. My first stop was at the bureau desk on the 2nd floor.
Q. Did you talk to anyone at the bureau desk?
A. Yes, sir, I spoke to the sergeant on duty.
Q. What conversation did you have with him?
A. I asked him for a permit to see my client.
Q. Did you tell him who your client was?
A. Yes, sir.
Q. What did he say?
A. He said—he first made a call to find out if they were in [fol. 17] the bureau lock-up. He learned that they had been taken downstairs to the homicide bureau. So then he called the homicide bureau and told me I was denied permission to see my clients.
Q. He told you you couldn't see your clients?
A. Yes.
Q. All right. Then what did you do?
A. I then went to the homicide bureau.
Q. That is on the 3rd floor?
A. Third floor, yes, sir.
Q. Did you go into the department?

A. Yes, sir, I walked partially in. An officer stopped me.

Q. Do you know who the officer is?

A. No, sir, there were several.

Q. Did you have any conversation with him?

A. He asked me who I was. I told him, I identified myself.

Q. By identifying yourself, what did you say?

A. I said, I told him my name and told him I was the attorney representing Robert Chan and Danny Escobedo.

Q. What else did you say to him?

A. I asked him for permission to see my clients.

Q. What did he say?

A. He said, no, I couldn't, that he wasn't through with him.

[fol. 18] Q. He what?

A. I couldn't see him because they weren't through with him.

Q. Did you have any further conversation?

A. I persisted. I again asked to see my clients, told him I had a right to see my clients. Again he denied me that right.

Q. Did you at that time refer him to the statutes of the State of Illinois, making it the duty of police officers to permit you to see your clients?

A. Yes, sir, I did.

Mr. Wesolowski: Objection.

The Court: He may answer.

Mr. Bellows: Q. What did you say?

Mr. Wesolowski: Objection.

Mr. Bellows: Your Honor, this is one of our points to indicate that this statement should not be introduced.

The Court: Overruled, he may answer.

The Witness: I told him by law I had a right to see my clients.

Mr. Bellows: Q. Did you refer to any particular section of the statute?

A. Yes, sir, I did. And I told him that I had the right whether or not the client was booked or not. So again he said I couldn't and he referred me to the officer who was in charge of the building for that night.

[fol. 19] Q. Who was that?

A. I believe his name was Flynn.

Q. His name was Flynn?

A. Yes, sir.

Q. All right. Did he hold any position other than patrolman?

A. Yes, sir, I believe he was. I believe he was a lieutenant. They referred to him as Chief.

Q. Did you talk to him?

A. Yes, sir.

Q. What conversation did you have with him?

A. I again identified myself and again I asked for permission to see my clients.

Q. What did he say?

A. He said I couldn't.

Q. Is that all of the conversation that took place?

A. I also referred to the statutes giving me the right to see them. He again said they were still being questioned and I could not see my clients. We spoke back and forth for a little while.

Q. All right. Now, then what did you do?

A. I shuttled between the 2nd and 3rd floors, asking every officer to see my clients, and each time it was denied.

[fol. 20] Q. Did you have any conversation with anybody connected with the State's Attorney's Office?

A. There was a phone call from somebody in the State's Attorney's Office.

Q. To whom?

A. To one of the police officers.

Q. To which department?

A. In the homicide bureau.

Q. And was there any statements made after that phone call came in?

A. The officer there told me the Assistant State's Attorney told me to get a writ.

Q. To get a writ. What time of the day or night was that?

A. This was about 1:00 a.m. in the morning.

Q. You couldn't very well get a writ at that time, could you?

Mr. Mackoff: Object, your Honor.

Mr. Bellows: Q. By a writ, you mean a writ of habeas corpus?

A. Yes, sir.

Q. At any time did you have occasion to see any of the persons that were held, that were your clients?

A. I caught one glimpse of Escobedo. I didn't see Chan at all.

[fol. 21] Q. And now, what time did you leave the detective bureau?

A. Approximately 1:00 a.m.

Q. Did you ever make a complaint about the refusal to see your clients?

A. Yes, sir, I did.

Q. To whom did you make the complaint?

Mr. Wesolowski: I object, your Honor.

The Court: Sustained. I don't think this has any bearing upon this particular motion to suppress the confession, whether or not he made a complaint about a refusal.

Mr. Bellows: I would like for the record to make an offer of proof, that he complained to the high officials of the police department that he had been denied this privilege and that there had been an investigation made of it and what they told him.

The Court: Objection sustained.

Mr. Bellows: You may cross examine.

Cross-examination.

By Mr. Wesolowski:

Q. You didn't have a writ of habeas corpus then when you were there, is that right?

A. No, sir.

Q. And you stayed until 1:00 o'clock in the morning?

A. Yes, sir.

Q. Now, what section of the statute did you cite to this [fol. 22] police officer.

A. I have it in my book, all the citations, if I could point out—

Q. Do you recall what section it was?

A. No, sir. I can refer to it, to my book I keep with me.

Mr. Bellows: You have it with you now?

The Witness: Yes, sir.

Mr. Bellows: Read it to him.

Mr. Mackoff: I object, your Honor.

Mr. Wesolowski: If I may be permitted to cross examine.

Mr. Bellows: Your Honor, I don't know what Mr. Mackoff is doing. He is an interloper here.

Mr. Mackoff: My appearance is on file in this court.

Mr. Bellows: I don't know what you are doing in this case. I object to an interloper moving in on this case.

Mr. Mackoff: I will object to Mr. Bellows' remarks.

The Court: One of you will try this, not both of you, not both attorneys at the same time.

Mr. Mackoff: Judge, this is cross examination.

Mr. Wesolowski: Q. How long had you represented Chan and Escobedo—let's say Chan, prior to January 30th of 1960?

A. About 6 months prior thereto. They had been involved in an auto accident.

[fol. 23] Q. You represented them in that matter?

A. Yes, and then one week, approximately one week before January 30th, they had been arrested on the same charge. At that time I obtained a writ of habeas corpus for their release and they were released.

Q. Subsequent to their release did you talk to them?

A. Yes, sir, every day.

Mr. Wesolowski: No further questions.

Mr. Bellows: You may step down.

(Witness excused)

Fred Montejano, called as a witness on behalf of the People of the State of Illinois, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wesolowski:

I am Fred Montejano and I am a police officer for the City of Chicago assigned to the Homicide section, Detective Bureau, and was so assigned on January 30, 1960. I have been a police officer for a little over three years. On that date I had occasion to see the defendant in this cause, Daniel Escobedo. I first saw him at the Homicide section, 1121 South State Street, at about 10:00 o'clock p.m. When

I saw him, he was brought in under arrest. When he [fol. 24] arrived, I questioned him in regards to the killing of Manuel Valtierra. I questioned him in the room left of the secretary's desk in the Homicide section at 1121 South State. I told him that DiGerlando had said that he was the trigger man in the killing of Manuel Valtierra and he said, "He is full of shit." I says, "well, would you like to confront DiGerlando and tell him that?" and he said, "Yes." He was taken into a side room left of the room where he was at, and confronted with DiGerlando. When I say, "DiGerlando," that is Benedict DiGerlando. I believe Officer Thomas O'Malley was there when they confronted each other. I believe, at that time, Deputy Chief of Detectives Patrick Flynn came in. I don't recall how long I remained in that room. I next saw Daniel Escobedo when he gave me a written statement to Assistant State's Attorney Cooper, Don Flannery, and myself, in the Lieutenant's office. (Whereupon, People's Exhibit 1 was marked for identification.)

The Witness: I first saw Exhibit 1 on February 1, 1960 at the State's Attorney's Office but I had no opportunity to read it. From the first time that I saw Daniel Escobedo up to the time that he had completed making his statement to Assistant State's Attorney Cooper, I did not or anyone in my presence beat, strike, hit, or threaten him or make any promises of leniency or reward or leniency of prosecution, if he made a statement. All I testified to, occurred in [fol. 25] the City of Chicago, County of Cook, and State of Illinois.

Cross-examination.

By Mr. Novit:

The Witness: I saw the defendant before January 30th, 1960 and it was during the middle of the week between the 20th and 30th of January, 1960. I saw him in regards to this investigation. I did not take him into custody the first time I saw him. I was not with anybody that did take him into custody at that time. As to what happened, I asked Mr. Escobedo and Robert Chan to give me a statement regarding the death of Manuel Valtierra. I asked for this statement on Wentworth, between 22nd and 23rd,

I believe it was near Chan's home. In other words, I saw the defendant on the street, stopped him at that time and talked to him. I believe he was in the presence of Chan at that time. At that time, I was with my partner, Officer Rowan. The defendant would not make a statement of any sort. I don't recall the exact words he used, but he wouldn't tell us anything pertaining to the case. I don't know if he gave any reason why he wouldn't talk about the case. He might have said that he would not talk unless he talked to his attorney first. I don't recall if I already testified that he said this. The next time I saw him was on the 30th of January at the Homicide office at around 10:00 o'clock at night. I had no part in the taking of the defendant into custody. I believe my partner, Gerald Sullivan took him into custody. I believe he was with Officer Thomas O'Malley [fol. 26] when I first saw him. I was not assigned the job of questioning this specific defendant. I believe when I first saw the defendant at approximately 10:00 p.m. I started questioning him and I believe Officer Thomas O'Malley was questioning him at the same time. I believe the defendant was standing at that time but I am not very sure of that. I believe he was standing on certain occasions. As to whether his hands were cuffed behind his back, I remember that he was handcuffed, but I don't know if they were in the back or not.

Q. Certainly if he was standing and sitting on various occasions you had the chance to observe him. You should know if his hands were in front of him or in back of him.

Mr. Wesolowski: Objection.

The Court: Argumentative. Sustained.

Mr. Novit: Q. Did you ever walk behind the defendant at this time?

The Witness: A. I may have. I don't recall, Counselor.

Q. Do you recall seeing his hands criss-crossed behind his back and handcuffed?

A. I don't recall.

The Witness: I speak the Spanish language, I am of Mexican origin, and I believe the defendant Escobedo is also. [fol. 27] Police records list him as a white Mexican. As a matter of fact, I knew that he was of Mexican descent at

the time I saw him on the 30th. I use Spanish language in my police work.

Q. When?

Mr. Wesolowski: Objection.
Mr. Mackoff: Objection.
The Court: Sustained.

The Witness: I did not use the Spanish language in the investigation of this particular crime. I did not use the Spanish language with relation to this defendant. In the course of questioning the defendant, I did not speak to him in Spanish. I believe it was just a few minutes after he was brought in that he was confronted with DiGerlando, and he agreed to give an oral statement. By a few minutes, I would say ten minutes. I believe it was ten minutes after ten o'clock when he made his first oral statement. I and Officer O'Malley were present when he made the oral statement. I was in the various rooms all the time he was in custody at the Homicide bureau. I wouldn't say that I was in the presence of the defendant from the time he was taken into custody until the time he made his first oral statement. Various police officers were present from the time he was there until approximately ten after ten when he made his first oral statement. I believe I was present about ten minutes before he made an oral statement to me. I remem- [fol. 28] ber most of the conversation I had with the defendant during the ten minute interval. To the best of my knowledge, I says to Mr. Escobedo, "Do you want to make a statement in relation to the death of Valtierra?" I said, "DiGerlando told us that you are the trigger man." And he says, "He is full of shit." He says, "He is the one." And I said, "Would you care to confront him?" And he said, "Yes, take me to him," or something to that effect. I then took him to him. As he was being taken into the room left of the room that Danny Escobedo was at and just about that time Lieutenant Patrick Flynn, Deputy Chief, came into the room there and I left. As to whether, "He is full of shit." "He is the trigger man." is the only statement he made, he said something like, "He is the one that killed him, he is the trigger man." I also sat in for the written statement. At that time, the co-defendant Benny was in the room left of the room that Danny Escobedo and Chan were in. The

rooms were separated with a doorway in between. I never made any statements when I first talked to the defendant that he would only be used as a witness if he pointed his finger at Benny. I did not tell him that he would be able to go home that night. I did not tell him, "You and your sister can go home right now if you put your finger on Benny."

[fol. 29] Q. Now, at the time you told the defendant that the co-defendant had made a statement implicating the defendant as the trigger man, did you in fact have a statement?

A. A written statement or oral statement?

Q. Either type.

A. No.

Q. Did you quote a statement that the co-defendant was to have made to you at the time? Did you quote that statement to the defendant?

A. Would you explain that to me? We had an oral—

Q. I just asked you that question. Did you have an oral or written?

A. I didn't understand the question. I am sorry, counsel.

Q. I will ask the question again. Did you have any type of statement from Benny?

A. We had an oral statement from DiGerlando; yes, sir.

Q. And was this oral statement witnessed by anybody?

A. Believe it was Officer Thomas O'Malley.

Q. O'Malley was the only one who had witnessed this statement?

A. Yes, that's right, sir.

Q. It hadn't been taken down by a shorthand reporter at that time?

A. No, sir, just an oral statement.

[fol. 30] The Witness: I found out about this oral statement because I was there when DiGerlando was brought into the Homicide office. The oral statement was made between 7:30 and 8:00 o'clock, about 7:45 to 8:00 o'clock. I was present at the time the statement was made, O'Malley and myself witnessed it. At approximately 10:00 o'clock, I confronted the defendant Escobedo with a statement given by DiGerlando to the effect that he had done the killing.

Q. During the time that you were talking to Escobedo did he at any time tell you that he did not want to speak to you until he had spoken to his attorney?

A. I don't recall, sir.

Q. Did you hear him say that to anybody?

A. I don't recall.

The Witness: I never came in contact with an attorney by the name of Warren Wolfson. I did come in contact with him just the other day in court. I did not come in contact with him at the Homicide section on January 30, 1960. I did not of my own knowledge know that the defendant had an attorney who was trying to contact the defendant on this day or that he had an attorney present trying to see him. As to whether there was any conversation between DiGerlando and the defendant, about that time, as we were taking Escobedo into the room where DiGerlando was being—was at, Lieutenant Flynn, the Act-[fol. 31] ing Chief of Detectives, came in and I came out of the room. I didn't hear anything. I don't recall if Flynn was alone with DiGerlando. They were taken into the same room together and then Flynn walked into the room. To the best of my recollection, I left as soon as the Chief came in. I don't recall how long the Chief was in the room with these two boys. The next time I saw the defendant was when he was taken into the Lieutenant's office to give a written statement. This was around 11:15 to 11:30. The Lieutenant is Deputy Chief of Detectives, Patrick Flynn. The Chief wasn't present at that time, 11:15 in Flynn's office, it was just myself, Assistant State's Attorney Cooper, Don Flannery, and the defendant Daniel Escobedo. I don't recall if the defendant was handcuffed at the time. I did not have a conversation with the defendant at this time, Assistant State's Attorney Cooper did. I said nothing whatsoever. To my recollection, Flannery did not talk to the defendant. I don't recall if the defendant had any conversation with any of these people before he sat down to give a written statement. He talked to me and I confronted him with the statement of Benedict DiGerlando. As to whether this was at 11:15 in the Chief's office, no, no. He didn't talk to me then, he talked to Assistant State's Attorney Cooper. As to whether at this time did I hear the defendant ask Cooper or any of the other men present for the right to

speak to his attorney, not to my recollection. At this time [fol. 32] I did not know that the defendant had an attorney that was trying to see him.

(Witness Excused)

Thereupon the State rested.

PATRICK J. FLYNN called as a witness herein, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Novit:

The Witness: I am Officer Patrick Flynn and I am not at the present time assigned to the Homicide Division and was not so assigned on January 30, 1960. On January 30, 1960 I was a Lieutenant assigned as Deputy Chief of Detectives and at about 10:15 in the evening I saw the defendant Escobedo in the Homicide Office. I asked him his name and his age and he told me his name was Daniel Escobedo. I asked him if he had retained counsel and he told me he had not. He told me that he was brought in for the investigation of a shooting of his brother-in-law at 3703 West Lexington Street, and he told me that he wasn't going to be the fall guy, that a fellow by the name of Benny DiGerlando was the one that had shot his brother-in-law. This conversation took place in Room 315, Homicide office, 1121 South State Street with Detective Gerald Sullivan and Officer McNulty, I believe, present. This was not in the same room with DiGerlando. The statement was not made in my office but was the Homicide office. He never made a demand of me to see an attorney.

[fol. 33] Q. Did he ever make a demand of you to see an attorney?

A. No, sir.

Q. But you told him of his right to see one, isn't that right?

A. I had advised him that an attonrey had identified himself; stating that he had been retained by him.

Q. And this was Mr. Wolfson.

A. The name was Wolfson.

Q. And the defendant asked to see Mr. Wolfson then?

A. No, sir.

Q. Did you ask him specifically if he wanted to see Mr. Wolfson?

A. No, sir.

The Witness: I did not make a statement to the defendant telling him that if he pointed the finger at Benny Di-Gerlando that he would be used only as a witness. I did not tell him that if he told the truth about Benny that he would be able to go home that night with his sister. I was in and out of the defendant's presence from 10:15 or thereabouts until I saw the State's Attorney at 11:15. He had been sitting in a chair in the main office of the Homicide and when I identified myself as the Deputy Chief of Detectives, he stood up and had this conversation with me. He made an oral statement to me and Detective Gerald Sullivan was standing by when he did.

[fol. 34] Cross-examination.

By Mr. Mackoff:

The Witness: Officer O'Malley was also present in the office with Officer Sullivan. I am not positive but I would judge the last time that night I saw defendant Danny Escobedo was about 12:15 or 12:30 a.m. Between the time I first saw the defendant and the last time I saw the defendant, no one struck, hit, or beat or in any way threatened to strike or beat the defendant and no one during that time promised the defendant any leniency or reward for making a statement.

(Witness Excused)

The Court: Call the next witness.

Mr. Novit: Your Honor, I am going to ask again that the State be ordered to call everybody present at the time, since my client was taken into custody since the written confession was made. I am going to refer the Court to the very last hearing that was made on a similar motion of this type, State vs. Chan. I am going to ask the Court again, since one defendant was given this opportunity whereby counsel

could cross examine the witnesses, I am going to ask the Court for the very same opportunity.

Mr. Wescolowski: Your Honor, about a week ago the State cited a case, Mr. Mackoff went back to get the citation, which sets out the procedure the Supreme Court discussed in that particular opinion.

The Court: I am aware of that. I am going to overrule [fol. 35] the defendant's motion. I think we can do this and accomplish the same thing more orderly. So, if you want to call any witnesses you may at this time and State can rebut it.

Mr. Novit: Then I will put the defendant on the stand at this time.

Danny Escobedo, defendant herein, called as a witness on his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Novit:

The Witness: I am Danny Escobedo, the defendant in this case. I was first taken into custody by the police on January 20th at about 2:30 in the morning. There were about seven or eight of them who entered my sister's home at 806 West Lawrence Avenue. Robert Chan who was with me at the time was also arrested. We were put into separate detective cars and were separated all the way to Fillmore Station. I don't know the detectives that were in the car I was in. The detective in the car asked me while they were taking me down to the station why I killed my brother-in-law. I said, I didn't know anything about it. I did not ask to speak to a lawyer on the 20th as I did not have an attorney at that time. We arrived at Fillmore Station around 3:00 or after in the morning. They held me in one room and took Chan into a different room and interrogated [fol. 36] us. I was released at 5:00 o'clock that evening and was there from 3:00 a.m. until 5:00 that evening. I don't recall the names of any of the detectives or police officers that were questioning me. I denied all knowledge of the crime. I was not handcuffed at that time. After they finished

questioning me, they put me back in the cell. When they released me at 5:00 o'clock that evening, they said they had no reason to hold me any more. When I was arrested, no one showed me a warrant for my arrest. I was taken into custody a little after 8:00 o'clock on the 30th. They arrested my sister, Grace Valtierra, and me at her home, 3703 West Lexington. On the way down to 11th and State from my sister's home, they asked me questions and I denied everything when I got there as I did in the car. There were two officers who took me into custody at this time but I don't know their names. My sister sat in the front seat in between two detectives and I sat in back with another detective. One of these detectives was in the car when we went down. The detectives said they had us pretty well, up pretty tight, and we might as well admit to this crime. I said, "I still don't know anything of what you are talking about." I did not ask the detectives for the right to speak to my counsel until I got in the office at 11th and State. Then, this one detective, whose name is unknown to me, walked up to me and said that DiGerlando, that they had proof that I had done the shooting, and I said, "I am sorry but I would like [fol. 37] to have advice from my lawyer." He ignored me when I told him that and he walked away. Shortly after that he came back and said they had a witness that said he had seen me shoot my brother-in-law, in the next room. I said I would like to see my lawyer. They did not permit me to see my lawyer at any time. This one detective whose name I do not know, said my lawyer didn't want to see me. The detective was an elderly man, medium height, not too heavily built. He questioned me when I first got into the office. I couldn't recall his name, in answer to your question, Was this in fact Detective Flynn. I talked to Detective Montejano about 10:00 or 10:30 when he first approached me. Detective Montejano made promises to me. He told me that DiGerlando had already made a statement saying that he shot the man, my brother-in-law, and he would see to it that we would go home and be held only as witnesses, if anything, if we had made a statement against DiGerlando. He said we would only be held as witnesses against DiGerlando and that we would be able to go home that night. As to whether I gave a statement to Detective Montejano after the promises were made, I gave no statement until the

State's Attorney came to get a statement. As to whether I made an oral statement to Montejano, the only thing I said was that Benny was lying. That I did not kill by brother-in-law, maybe he did.

[fol. 38] Mr. Novit: Q. At any time during your conversation with Detective Montejano did you ask him for the right to see your attorney?

The Witness: A. I did.

Q. Did you tell him the name of your attorney?

A. No, I did not mention any name to him. As I sat in this room behind the desk, where the desk is so high, my lawyer was standing on the other side asking two of the detectives that were by the desk at that time, that he would like to see me and talk to me and they refused him the right to come and talk to me.

Q. You could see your lawyer?

A. I saw him.

Q. From your position?

A. From where I was sitting, yes.

Q. Do you know who was talking to your lawyer, the names of the detectives?

A. No, I don't.

The Witness: There were a few police officers that came in and out of the room that asked me questions and told me that I had done it because the other person DiGerlando said I did, and I said I don't know anything about it. I don't remember speaking to Detective Flynn. I saw the State's Attorney at midnight or a little after. I didn't have [fol. 39] any conversation with the State's Attorney before I made the statement to him. There was no conversation with the State's Attorney in the State's Attorney's Room except the questioning that the State's Attorney asked for.

Q. Did you ask the State's Attorney for the right to see your attorney?

A. No, because I was denied before and I figured that he would be in——

Mr. Mackoff: Objection.

The Court: That part may be stricken, what you figured.

The Witness: As to the names of any of the other people present at the time I was speaking to the State's Attorney,

there was just one officer, Montejano, and the court reporter. The State's Attorney did not advise me of my right to have counsel. The State's Attorney didn't ask me if any of the police officers had made promises to me. The statement which I gave to the State's Attorney is not true. As to why I made this statement to the State's attorney, I saw that my sister was being put at the head of this crime and I knew she had not done it and I wanted to help my sister and that is the reason why I made the statement. The fact that I had been made promises by Montejano had a bearing upon my making this statement. The fact that the police officers made promises specifically that I would not be prosecuted if I [fol. 40] made this statement had an effect upon my making the statement. The promises were in fact the motivation that made me make this statement. During the time I was held in custody by the police on the 30th, I was handcuffed all the time except when they took me in front of Benny, when he made his statement, and when they brought me in before the State's Attorney. As to Detective Montejano making any references to me about co-defendant DiGerlando, he said at one time that why should I be blamed along with Benny when I could go home that same night and be a witness for the State against him. There were a couple of times he spoke Spanish to me. At one time when I was in this room where I saw my lawyer and was handcuffed to the chair next to the filing cabinets, Montejano told me in Spanish that he went to school with one of the brothers and he might be able to help me if I went against Benny. He made reference to my nationality and Benny's nationality when he said "Benny is Italian and no use in a Mexican going down for an Italian."

The Court: How old are you?

The Witness: 22, your Honor.

Cross-examination.

By Mr. Mackoff:

The Witness: My name is Danny Escobedo and at this time I was living at 2741 South Princeton. I don't know who the officers were that picked me up. I only saw one of the officers who picked me up in the Court room this morning. During the time my case has come to this court, I saw

[fol. 41] just two of the officers. I didn't see the officer that told me that things were pretty tight against me. The two officers I saw are the ones I saw down at 11th and State, I don't remember the ones that picked me up that night. I have never seen one of the officers that picked me up and told me things were pretty tight, since. Between the time I was picked up and the time I was brought down to 11th and State, no one made any promises to me and no one hit or beat me, and no one at that time told me I could go home after I did anything. When I got to 11th and State, I was first brought into the Homicide Bureau. At that time, I didn't talk to any one, they just brought me in and sat me in the chair and cuffed me. When I was brought in, my hands were handcuffed behind. I then sat on the chair and the handcuffs were not taken off me at that time. They were put on the arm of the chair and cuffed around the arm. The room was a medium sized room. There was a door on it which I walked in and it was open. There was a desk and off to the left is where I sat in the room and there was another room right directly in back of the desk. When I sat in the room by the desk, I could see anybody that came in the door. The door is off to the side of the desk and a good 20 feet away. The desk was no more than 9 feet away from me. At the time I was sitting there, I saw my lawyer standing near the desk but not come in. I had seen this lawyer before [fol. 42] and knew his name and I had talked to him several times before. I did not call out to him. They told me not to say anything to anyone. As I was sitting there, I saw him and he saw me. As to whether he said anything to me, he motioned to me and that was it. He nodded his head more or less. As to what direction, in a manner towards the side. As to what this meant to me, I wouldn't know, I guess it meant just to let me know he was there. I didn't know he was there until I saw him. I knew he came there to help me before I saw him motion his head and I knew he came there to help Robert Chan. At the time I saw him, he didn't tell me to talk to the officers and he didn't tell me not to talk to the officers, he didn't say anything. We had a conversation in regard to the case a couple of days before. At that time, he told me that if I was arrested at any time to tell the officers in a nice way that I was sorry but I could not talk to them until I had the advice of my lawyer. I told the

officers that. I only made one statement and that was in the presence of the State's Attorney and was taken down in shorthand. Everything I told them regarding the crime was not true. Prior to the time that I had made the statement, I had no knowledge at all regarding the death of Manuel Valtierra. I had no knowledge of how he was killed. At the time I made the statement, I didn't know how he was killed. The only person I talked to in the office then was [fol. 43] Mr. Cooper and he didn't tell me what to say.

Q. Now, at the time that your lawyer was there and you saw him and he shook his head at you, did you hear him talk to anybody else?

A. He talked to two detectives standing by the desk and asked if he could talk to me.

Q. I see. And did you hear the rest of the conversation?

A. I heard this one detective, said that they are not done interrogating us and he would not be able to talk to us at all until they were done.

Q. And he left there, is that right?

A. No, he didn't leave. He was more or less going to stay there out in that little waiting room, or whatever it is there. And the detective said, "You can't stay there."

Q. And during the time that—how long did he stay in that room?

A. Just the time while he was talking to the detectives.

Q. About how long was that in minutes?

A. Oh, it was a short conversation, within five minutes.

Q. And during that time were you talking to the detective at the table there?

A. No, just sitting there alone.

Q. And you were watching this?

A. I was looking at them, yes.

[fol. 44] Q. And during that time he didn't tell you not to make a statement, is that right?

A. He mentioned something and in a loud voice, but I couldn't make it out.

Q. What did he mention in a loud voice?

A. I couldn't make it out.

Q. He was standing 9 feet away from you, is that right?

A. Yes.

Q. As a matter of fact, he was standing closer to you than I am sitting away from you now, is that right?

A. About the same distance.

Q. And he said it in a loud voice, is that right?

A. A little louder than yours is now.

Mr. Wesolowski: Let the record show that Mr. Mackoff is sitting about 10 to 12 feet away from the witness chair.

The Court: The record may so show.

The Witness: I don't recall even talking to a Captain Flynn, the man that testified before me today. I saw him that night in a little room where they had Benny DiGerlando. I didn't say anything to him. I didn't ask to see an attorney, not to him, no. He didn't tell me that there was a man who claimed to be my attorney. As to whether I saw my attorney after the time I was sitting in the office by the desk, I just saw him that once when I was [fol. 45] sitting in there. I was sitting in the chair in that room for a good half hour, in the same chair. From there, they brought me back in the room where Chan was sitting in a kitty-corner angle. This room was right next to the room I was sitting in and the door was open. I couldn't hear what was going on there during that time because the door was in front of me and I was sitting towards the window and Chan was in the other room. When I went in there, Chan did not come out. This was before we gave the State's Attorney a statement. When I went in the room, Chan was sitting on the other side and there was Montejano and two other detectives. I did not give a statement at that time. I did not say anything regarding the case.

Q. At that time did you say you wouldn't say anything until you saw your lawyer?

A. I told him that before.

Q. But you didn't tell him at that time?

A. No, because they kept denying me the right of my counsel.

Mr. Mackoff: Objection to the answer. That is not responsive, not proper.

Q. Did you say at that time you wanted a lawyer?

The Witness: A. No.

Q. And did you say at that time you wouldn't say anything until you saw a lawyer?

[fol. 46] A. That's right.

Q. Or did Chan say he wouldn't say anything until he saw a lawyer?

A. He did.

Q. Chan said it at that time?

A. Chan said it before and at that time and the time after that.

Q. All right. Now, how long did you remain in that room?

A. I was seated there about twenty more minutes after that when the State's Attorney walked in with the court reporter.

Q. When the State's Attorney walked in did you ask to see your lawyer?

A. No, I didn't.

Q. Did you tell him you wouldn't make a statement without seeing your lawyer?

A. No, I didn't say anything to him at that time.

Q. Except the statement, is that right?

A. No. When he walked in, he took off his coat, two detectives met him, and walked into a different room.

Q. After they were in a different room they came back, is that right?

A. Not exactly. He stood more or less in the doorway while Montejano directed me into the room where he was.

Q. And when you got in that room you were there with the Assistant State's Attorney, the court reporter and Montejano?

[fol. 47] A. That's right.

Q. And at that time did you ask to see your lawyer?

A. No, I didn't.

Q. And at that time did you say you wouldn't say anything until you did see your lawyer?

A. No, I didn't.

Q. Did you tell the State's Attorney that you were only a witness in the case?

A. No, because Montejano had told me that this was between ourselves.

Q. This was between yourselves. Did you tell the State's Attorney that you had promised that there would be no

proceedings against you and you would be allowed to go home?

A. No, I didn't tell him anything like that.

Q. Did you tell the State's Attorney that what you were saying was not the truth?

A. No, I didn't.

Q. Now, Mr. Witness, at the time you were told that if you implicated DiGerlando that you would be only a witness and that you would be allowed to go home after that, who told you that?

A. Montejano.

Q. And when did he tell you that?

[fol. 48] A. That was after he questioned me, in the other room.

Q. And who else was there at the time?

A. Robert Chan was on the side.

Q. And who else was there?

A. Just I, Montejano and Robert Chan.

Q. Were there any other police officers?

A. No, there were no police officers there.

Q. And at that time did he say that to you in English or Spanish?

A. He told me that in English.

Q. In what?

A. In English.

Q. And did he tell you what you would have to do aside from making the statement?

A. All he said is that I would just have to make the statement and that would be it.

Q. Now, that was before you saw your lawyer?

A. That was. I didn't see my lawyer at all.

Q. Well, you saw him come into the room, is that right?

A. Well, I mean, that isn't exactly seeing him.

Q. You saw him with your eyes?

A. Yes.

Q. And you saw him move his head?

A. Yes.

[fol. 49] Q. Now, at that time did you know that your lawyer was in the building?

A. No, I didn't.

Q. Did anyone tell you before you saw your lawyer that your lawyer was in the building?

A. No, no one said anything.

Q. And at the time that you were sitting in the chair you were sitting there alone, is that right?

A. Yes.

Q. Now, did Montejano at that time tell you that Escobedo had said that you shot him, Manuel Valtierra?

A. I don't understand.

Q. Pardon me.

A. You are using two names.

Q. I am sorry. At the time that you were in with Chan and Montejano, did Montejano tell you that DiGerlando had said that you had shot Manuel Valtierra?

A. He did.

Q. And at that time did you say he is full of shit?

A. Yes, I did.

Q. And at that time did you ask Montejano to be taken to DiGerlando, to confront him?

A. Yes.

[fol. 50] Q. And after that you left the room, is that right?

A. After I told him that, they sat me in the chair.

Q. And no one had talked to you?

A. Not until they brought me in the [redacted] to where Benny was.

Q. And when was it that Montejano was talking to you in Spanish?

A. That was in the outer room where the desk is, and in front of Chan, he mentioned Spanish again.

Q. And that was after you had seen your lawyer in the room?

A. No, that was before.

Q. That was before?

A. Yes.

Q. Now, at the time that you were seated in the outer room you stated before that nobody had talked to you when you were seated in that outer room, is that right?

A. No, just Montejano.

Q. Just Montejano. And what did he say to you at that time?

A. I told him—he said, why should I take the fall for an Italian.

Q. And he didn't say anything else at that time?

A. Yes, that he was a friend of one of the brothers because he went to school with him.

Q. And he didn't say anything else other than that?

A. No. He said he might be able to help me.

Q. Now, is that all that he said at that time?

[fol. 51] A. At that time in that room.

Q. And you don't remember him saying anything else at that time?

A. No.

Q. Now, you testified before that Montejano mentioned to you that DiGerlando said that you killed your brother-in-law and you told him that he was full of shit, is that right?

A. Yes, sir.

Q. Now, you asked to confront DiGerlando?

A. Yes.

Q. Did you ever confront DiGerlando that night?

A. I did.

Q. And what happened at that time?

A. DiGerlando made his statement that I had shot my brother-in-law and run through his story.

Q. And what did you say at that time?

A. Well, they didn't let me speak at all in the room, as I was told by this one detective.

Q. In order to answer my question—understand the question?

A. Yes.

Q. What did you say at that time? Did you say anything?

A. I couldn't say anything.

Q. Did you say anything?

[fol. 52] A. No, not during, while he said his story.

Q. And after that you told—you were talking to the detective, is that right?

A. Well, after he got through with his story, then I said, "You are lying."

Q. O.K. And you said to the detectives he is lying, as far as DiGerlando?

A. Yes.

Q. Did you tell the detectives at that time that you would tell them what actually did happen?

A. No.

Q. And, as a matter of fact, did you make a statement after that?

A. No, I didn't.

Q. Did you make a written statement? Did you talk to the State's Attorney after that?

A. That was a couple hours after that.

Q. That was after you talked to the State's Attorney?

A. After I talked to DiGerlando, then I made the statement.

Q. To the State's Attorney?

A. Yes.

Q. That is what I was asking.

A. The way it sounded, that after I talked to Benny, I made the statement.

[fol. 53] Q. Well, you talked to the State's Attorney after you talked to Benny, is that right, in point of time?

A. I talked to Benny first, yes.

Q. That's right. And you talked to Benny about what time of the night?

A. Well, I wasn't paying much attention to the time then.

Q. Well, how long after you had been brought in did you talk to Benny?

A. It seemed like an hour, two hours.

Mr. Mackoff: No further questions.

Redirect examination.

By Mr. Novit:

Q. Danny, did you ever get any chance whatsoever to talk to your attorney?

A. No.

Q. This motion that he made to you, at the time did this convey any special meaning to you?

A. Well, I took it upon my own to think that he told me not to say anything.

Q. Now, were you in Chan's presence when he asked to talk to his attorney?

A. Yes, I was.

[fol. 54] Q. And what was the answer that Chan was given?

A. His lawyer does not want to speak with him.

Q. Did you ask to talk to your attorney at the same time Chan did?

A. Yes, we did.

Q. Pardon?

A. Yes.

Q. What was the answer given to you?

A. The same answer that I just said, that he didn't want to talk to us.

Mr. Novit: That is all.

Recross-examination.

By Mr. Mackoff:

Q. But at this time you had already seen your attorney, is that right?

A. No. This was about fifteen minutes after Chan was brought in.

Q. Well, at the time that this happened, did you see your attorney?

A. No.

Q. That was before your attorney came into the room?

A. Yes.

Q. And after that you did see your attorney?

A. After an hour or so.

[fol. 55] Q. You saw your attorney?

A. Yes.

Q. And he made a motion to you?

A. Yes, he did.

Q. And that motion indicated to you, first of all, that you shouldn't say anything, and second of all, he wanted to talk to you?

A. That's right.

Q. So at the time that you saw him you knew what they said wasn't true, is that right?

A. That's right.

Q. And this was before you made the written statement?

A. Yes.

Mr. Mackoff: O.K. No further questions.

The Court: You may step down.

(Witness excused)

GERALD SULLIVAN, called as a witness on behalf of the State of Illinois, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wesolowski:

The Witness: I am Gerald Sullivan and I am a police officer assigned to Homicide Section, and have been a police officer for eighteen years. On January 30, 1960 I had occasion to arrest Daniel Escobedo at 3703 Lexington, around 8:30 or 9:00 o'clock in the evening. I remained at the Detective Bureau thereafter all evening until they were put in [fol. 56] the lockup, upstairs, which was around 1:00 o'clock. From the time I first saw Daniel Escobedo until the time I left the Detective Bureau, I did not nor did anyone in my presence make any threats or in any way strike, beat, hit, or threaten to hit Daniel Escobedo, and no one in my presence made any promises of leniency or reward during that same period of time, to the defendant. I did not, nor did Detective Montejano in my presence promise Daniel Escobedo that if he was to make a statement against Benedict DiGerlando as a witness implicating DiGerlando in the killing of his brother-in-law, he would be permitted to go home.

Cross-examination.

By Mr. Novit:

The Witness: I made the actual arrest of Danny Escobedo with Detective John Loftus and Frank Lassandrella. I did not see the defendant before January 30, 1960. I saw him in the afternoon about 4:30 or 5:00 o'clock in front of the address, 3703. When I saw him earlier in the day, we were called over there to meet Officer Talty and Officer O'Malley and when we got there we were in front of the house and they were coming down, so Danny Escobedo happened to be in front of the house there. He came walking along the street and I believe he had a dog with him. I had no conversation with him then. After I took the defendant to 11th and State, I was not in his presence con-

tinuously. There were other officers questioning him all [fol. 57] during this time. At times I was in the presence of these other officers while they were questioning him, but not continuously.

Q. So, it is possible that there could have been promises made?

Mr. Wesolowski: Objection.

The Court: Sustained. That is argumentative.

The Witness: I wasn't in the defendant's presence at all times with Montejano. There were times when I wasn't within range of hearing their conversation. As to whether the defendant made any statement to me about this crime I was investigating, on the way in, I told him that DiGerlando had told us that he was the man that fired the fatal shots. This was in the squad car and at that time, he said that he would have to hear DiGerlando say it to his face. The defendant did not tell me at any time he did not wish to make a statement until he talked to his attorney. I did not hear him make that statement to any police officer in my presence. When I was not in the presence of the defendant, I could have been in any room in there, I could have been in the Lieutenant's office talking to Grace Valtierra, I could have been talking to DiGerlando. As to whether I was in the Homicide Division at 11th and State, I was in the Detective Bureau but I could have been out of the office, too. I saw Warren Wolfson after he was called to the Chief's office, I talked to him. I didn't have any conversation with him but I was there when conversation was carried on.

[fol. 58] Q. Did Mr. Wolfson make a demand to see his clients, who are the defendant and another Robert Chan, at this time?

A. Yes, he did.

Q. Who did he make this demand to?

A. Deputy Chief of Detectives Patrick Flynn.

Q. Did Mr. Flynn answer this demand?

A. He said that when we were through interrogating, we were in the process of interrogating these men, that they had only been in a short time, when we finished talking to him he would be able to see his client.

Q. About what time was this?

A. That was around 10:30 p.m.

Q. And was any time limit set whereby the attorney could see his clients?

A. No, sir. We were in the process of interrogating.

The Witness: On the way in, we had handcuffed the defendant behind his back, in the house, and we took him out of the house. He was handcuffed just behind his back and his hands were not crossed. I didn't handcuff him and I am not sure whether Lassandrella or Loftus did. The handcuffs were removed when he came into the Detective Bureau when we brought him up to our office. I don't know how long he was in the Detective Bureau before they were [fol. 59] removed. Maybe five, ten minutes. I observed him at various intervals between 9:00 o'clock and 1:00 o'clock in the morning. He may have been handcuffed when we took him back upstairs to the Detective Bureau lockup; that is a department rule. The defendant did not make any oral statement against his interest to me personally. I was present when he made an oral statement to Deputy Chief Flynn.

(Witness excused)

Theodore J. Cooper, called as a witness on behalf of the People of the State of Illinois, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wesolowski:

The Witness: My name is Theodore J. Cooper and I am and have been an Assistant State's Attorney in Cook County since February 17, 1958, and I was so working on January 30, 1960. On that date at 11:30 I went to the Homicide Division, I believe, on the third floor at 1121 South State. When I arrived, I took statements from some defendants and some prisoners that they had in custody. I had occasion to take a statement from one Daniel Escobedo whom I believe I see in the courtroom at the present time. Pointing him out, he is the gentleman sitting in the second seat. From the time I arrived until the time I completed the statement, I didn't, nor did anyone in my pres-

ence, strike, beat, hit or threaten to strike or hit or make [fol. 60] any promises of leniency or reward to Daniel Escobedo at 1121 South State Street. I don't recall any such statement of Detective Montejano telling the defendant Daniel Escobedo that if he was to make a statement implicating Benedict DiGerlando for the murder of Manuel Valtierra, that he would be permitted to go home with his sister.

Cross-examination.

By Mr. Novit:

The Witness: I can't tell exactly, but I believe I was called to the Detective Division sometime around 10:30 or earlier, or it could be later. As to when I took the statement from the defendant, if I can recall properly, I believe his was the first statement that was taken and I think it was prior to 12:00 o'clock. As to whether I discussed the case between 10:30 and 11:30 with any of the police officers, I wasn't in their presence, I was on my way to the station and arrived at about 11:30. When I arrived at the police station, I did not brief this case with any of the police officers. I had no chance whatsoever to find out the facts of this case from anyone present. Other than possibly saying hello, I would say the first person I talked to in the police station was the defendant. Other than exchange of hellos, I would say there was no discussion with the arresting officer or Detective Montejano at that time. I did not know at that time that the defendant had an attorney who wished to see him.

[fol. 61] Q. Did you advise the defendant of his right to have counsel?

A. No, I didn't.

Q. Was there any specific reason you had for not advising him?

Mr. Wesolowski: Objection.

The Court: Sustained.

Mr. Novit: Q. Did the defendant sign the statement that he gave to you?

The Witness: A. I don't know, sir.

Q. Did you ask him to sign any transcript of testimony or anything else?

A. No, sir.

Redirect examination.

By Mr. Wesolowski:

The Witness: I had been familiarized with the facts involving the shooting of Manuel Valtierra prior to January 30, 1960.

(Witness excused)

DONALD FLANNERY, called as a witness on behalf of the People of the State of Illinois, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wesolowski:

The Witness; My name is Donald Flannery and I am a shorthand reporter for the State's Attorney's office and have been so for three years in November. On January 30, 1960 I arrived at 1121 South State Street at around 11:15 [fol. 62] to 11:30 in the evening. I had occasion to be present when Mr. Ted Cooper took a statement from Daniel Escobedo. I have seen People's Exhibit 1, marked for identification and it contains a complete and accurate transcription of all that was said by Mr. Cooper to Mr. Escobedo and all the answers Mr. Escobedo made to his questions. From the time I arrived at 1121 South State Street up to the time that Mr. Escobedo had completed his statment, no one in my presence struck, beat, or hit, or made and promises of leniency or reward to Daniel Escobedo. Detective Montejano in my presence did not make any promises to Daniel Escobedo that if he made a statement involving Benedict DiGerlando he would be permitted to go home with his sister that night.

Cross-examination.

By Mr. Novit:

The Witness: I am a court reporter employed by the State's Attorney's office and have not had any other employment as a court reporter outside of the State's Attorney's office. I have been so employed three years this November. When I recorded a transcript of the testimony, I did it by stenographic machine. We use the phonetic alphabet. It is possible for any other court reporter who is familiar with this type of reporting to read the transcript of the testimony that I have taken. As to any modifications that I use, that another court reporter would not be familiar with, I [fol. 63] have brief forms of my own that maybe another reporter wouldn't use.

Q. Will you give me some examples?

Mr. Mackoff: Objection, your Honor.

The Court: Sustained.

Mr. Novit: Q. Well, you have told me first that you are using a standard system of reporting and now you are saying that you are departing from the standard system. How have you departed from the standard system?

Mr. Mackoff: Objection to arguing with the witness. Second of all, it is immaterial.

The Court: I think the witness said he has a few short briefs that he uses himself, in other words, short cuts.

The Witness: I arrived at 11th and State about 11:15 or 11:30. Upon arriving, I asked for Mr. Cooper and they informed me he was in the office and I notified him that I was there. I don't recall if I went directly to Mr. Cooper. I probably looked in the office and said I would be here and I would be waiting for him. I don't recall if I went up to him directly. I first contacted Mr. Cooper when I arrived there. At this time, he was in the office where they were taking statements. I think they call it the Captain's Office down there, I am not sure. I did not go directly into this office and stay there until the statements were taken. I walked in, reported to him, and walked out again. I don't [fol. 64] recall who was in the office when I first reported there. I do not recall if the defendant was in the office. I do not recall how many people were in the office. I do not

know if Mr. Cooper was alone in the office. I waited for ten or fifteen minutes, I am not sure, when Cooper called me back into the office. I waited outside the waiting room, I would call it the waiting room of the Homicide Bureau. I don't believe there are any other entrances to this office besides the one I was sitting outside of but I am not sure. I don't recall if I saw the defendant walk into this office while I was waiting there. After fifteen minutes, Cooper called me back into the office and at that time, Mr. Cooper, Officer Montejano and Daniel Escobedo were there. While I was there, there was not any conversation between these people before I started taking the official testimony down. I would say about thirty seconds elapsed from the time I was called back in the office until the time I started taking the official transcript of the testimony; enough for me to get the name of Officer Montejano. There was no other conversation at this time. During the course of the reporting, there were not any "off the record" remarks. I did not personally present a transcript of the testimony to the defendant for his signature and no one did in my presence. After taking the transcript of the testimony, I left 11th and State and went home and Monday morning I dictated the statement. I used a Stenorette machine to dictate it for the typist to [fol. 65] type it up. I read from my notes directly to the Stenorette machine which is a recording device. The recording goes to a typist who types it up. The final transcript in its completed form is presented back to me. I don't recall if this final transcript was presented back to me that day. I saw it today. Today is the first time I saw this transcript since the time I took it. I checked the transcript today back in the witness room there. The State's Attorney presented me with a transcript and I had time to read it. I checked my original shorthand against the transcript and this is a true and exact copy of my original shorthand reporting.

(Witness excused)

THOMAS TALTY, called as a witness on behalf of the People of the State of Illinois, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wesolowski:

The Witness: am police Officer Thomas Talty, assigned to the Homicide . ection, where I was working on January 30, 1960. On that date, I first had occasion to see Daniel Escobedo at about 10:00 o'clock in the evening in the Homicide Section at 1121 South State Street. As to how long I remained in the Homicide Section, the last I saw of him was at about a quarter to twelve. As to whether I remained after a quarter to twelve, I was in the building, that is all, [fol. 66] I didn't see him. From the time I first saw him until the last time I saw him, I did not and no one in my presence struck, beat, hit, threatened, or made any promises of leniency or reward to him. From the time I first saw him to the time I left, I did not hear Fred Montejano tell him that he would be permitted to go home that night with his sister if he made a statement involving Benedict DiGerlando in the killing of Manuel Valtierra. As to what other officers that I saw in and out of the Homicide section during the hours I was there, there were Officer Montejano, Officer O'Malley, Officer Sullivan and Deputy Chief of Detectives Flynn, that is about it.

Cross-examination.

By Mr. Novit:

The Witness: I was not with the defendant at all times while he was discussing the case with Detective Montejano. Montejano and I were not in turn questioning the defendant. I was with the defendant altogether about two minutes on the evening of the 30th at approximately 10:00 p.m. I saw him in the office after that up until about 11:00 o'clock, or later than 11:00 o'clock. As to whether I was in the vicinity, in the same room or anywhere, where I could hear any of the detectives, including Montejano, speaking to the

defendant between this couple minutes after ten and eleven o'clock, I saw him talking but I didn't listen in on the conversation.

(Witness excused)

[fol. 67] THOMAS O'MALLEY, called as a witness on behalf of the People of the State of Illinois, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wesolowski:

The Witness: I am police officer Thomas O'Malley for the City of Chicago, assigned to the Homicide section where I was so employed on January 30th 1960. On that date I had occasion to see Daniel Escobedo in the Homicide office, wait a minute, I saw him earlier in the evening around 4:00 or a little after 4:00. He was not under arrest at that time. When I saw him when he was under arrest it was say around 10:00 o'clock p.m. in the Homicide office at 1121 South State. He was in the Homicide office from about three and a half to four hours. I was there the entire time. From the time I first saw him until the time that he left, I did not or no one in my presence struck, beat, hit or threatened, or made any promises of leniency or reward to Daniel Escobedo if he made a statement in this case. During the same period of time I didn't hear Detective Fred Montejano at any time tell the defendant Daniel Escobedo that he and his sister would be permitted to go home that very night if they made statements, or if he, Daniel Escobedo, made a statement involving Benedict DiGerlando in the death of Manuel Valtierra. As to what other police officers were present at different times in the Homicide Bureau from the time Daniel [fol. 68] Escobedo first arrived until the time that he left, there was Captain Flynn, Fred Montejano, Gerald Sullivan, Thomas Talty and myself.

Cross-examination.

By Mr. Novit:

The Witness: I first saw the defendant a couple of minutes after we arrived in our office. I was not with him at all times while he was being questioned to or spoken to by the other police officers. I at no time heard conversations between the defendant and the other officers. I had a conversation with the defendant, and at no time did he ask me to speak to his attorney. I did not hear him ask anybody else. I never saw Attorney Warren Wolfson that night.

Q. Did you know of your own knowledge that there was an attorney trying to get to see the defendant there that night?

Mr. Wesolowski: Objection.

The Court: Sustained.

The Witness: As to when I first had a conversation with the defendant, it was shortly after he came into the Homicide office, I would say oh, the most about four to five minutes. As to what I said to the defendant, I informed him of what DiGerlando told me and when I did, he told me that DiGerlando was full of shit and I said, "Would you care to tell DiGerlando that?" and he said, "Yes, I will." So, I brought the two of them, or, that is, I brought Escobedo in [fol. 69] and he confronted DiGerlando and he told him that he was lying and said, "I didn't shoot Manuel, you did it". I told the defendant that he had been accused of this crime by DiGerlando. I didn't say to him at that time, "Why take a fall for him". I brought him into the room with DiGerlando and he was with him for about four or five minutes. As to whether he made a statement to me against his interests, it was an oral statement that he made at that time. Then, I brought him outside back to the room he was in to begin with. As to whether I continued questioning him, I didn't talk to him any more, that is when Captain Flynn talked to DiGerlando. As to what I did when I brought him back to the original room, I was along side of him only a couple of minutes and then some other officer was in there and then Officer Talty was there and Officer Montejano. As to whether they started

questioning the defendant, I don't know if they did or not, I didn't talk to him any more. I left the room. As to how long after the defendant was confronted with the co-defendant did I leave the premises, after I brought him out, from his talking to DiGerlando, I was in his company only a couple of minutes, and I didn't see him any more until after he made his statement, which I think was after approximately eleven, or eleven-fifteen in the evening.

(Witness excused)

[fol. 70] FRED MONTEJANO, called as a witness by the State of Illinois, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wesolowski:

The Witness: I am Fred Montejano who testified before and I understand that I am still under oath. I at no time ever told the defendant Danny Escobedo that he could go home the same night, January 30, 1960, if he gave a statement as a witness involving Benedict DiGerlando in the killing of Manuel Valtierra. I at no time told him that I only wanted him as a witness. I at no time that day asked him why he was taking the fall for an Italian, since he was a Mexican and that I also was a Mexican. I at no time spoke any other language than English or American with the defendant.

Cross-examination.

By Mr. Novit:

Q. Detective, did you on any occasion know the Valtierra family before this investigation took place?

Mr. Wesolowski: Objection.

The Court: Sustained.

Mr. Novit: Your Honor, I am trying to bring out a statement which was—we are alleging it was made.

The Court: You can't do it by this witness. He hasn't

testified to anything about knowing the family of Escobedo. You are confined in your cross examination.

[fol. 71] Mr. Novit: That is all, your Honor. No further questions.

(witness excused)

(Whereupon arguments were made by counsel for the defendant and the State, after which the Court made the following ruling:)

DENIAL OF MOTION TO SUPPRESS

The Court: I think what the courts have in mind here, they want to protect the rights of individuals who are under arrest, so that they won't, under the pressure of police activity, be made to give out statements that are derogatory to their best interests. Of course, the Court wants to be sure that the defendant, whatever he says, is done voluntarily.

Now, in the Chan case it was this Court's interpretation of all of the facts that Chan, even before he started to make his statement, before a word was said, he said, "I want to see my lawyer". Now, what answer is given? But he did say that. And then we have coupled to that the fact that his counsel was there and wasn't permitted to see him.

Now, in this instance here we have a situation where the lawyer did see him and the very fact that he saw him must have been some assurance to the defendant. Both of those cases where the defendent is under pressure, may be physical or another kind of abuse maybe is alleged, but the very fact that his lawyer saw him and saw his condition should [fol. 72] have given some assurance that he wouldn't be unduly mistreated. The lawyer had a chance to see him. He knew his lawyer was outside.

And then he said, the lawyer communicated to him, and said, what was the communication? Now, he didn't say by word of mouth, I don't know how, might have said it like this, clam up. So that, I don't know what else the lawyer could have said to him at that time, if he stood there in the room. He certainly wasn't in position to interrupt the police interrogation of him. He could have stood by. He probably would have told him, well, don't say anything. But he had the assurance too that this lawyer saw him there, that if he

had been abused unduly the lawyer there would have known about it.

I don't think we have the same set of circumstances. Both these other cases, these defendants were in there by themselves and had no assurance of any help or anybody interested. He knows his lawyer saw him. He was in the room with the police officers. Don't think it is the same situation.

And, of course, in all of these cases we have, most of them, they want to suppress the confession. Yet we do have to allow the police officers some latitude. Where that should break off is in the discretion of the Judge deciding each case. We can't say it is going to be two hours and fifteen minutes [fol. 73] or three hours and thirty minutes. We have to take the age and intelligence of the defendant.

I was impressed with this defendant's intelligence. I don't know how old he is but he certainly is not ignorant by a long stretch of the imagination. He is pretty keen and no evidence of any physical abuse here. Maybe he had the handcuffs on him but that is ordinary police procedure.

The motion to suppress in this case will be overruled as to Escobedo.

Mr. Novit: Your Honor, in this particular case, not only couldn't he rely on seeing his attorney he saw his attorney pushed out of a room in front of him.

The Court: He knew he was there.

Mr. Novit: But when you see somebody you are going to depend on being pushed out, and this man is an officer of the court, then you wonder what your chances are if your own attorney is pushed out of this room right in front of you.

The Court: I don't think we have the same situation.

Mr. Novit: Your Honor, the two of them were together. You have exactly the same situation.

The Court: October 10.

[fols. 74-86] REPORT OF PROCEEDINGS AT TRIAL

Report of Proceedings at the trial before Honorable Fred W. Slater in the Criminal Court of Cook County and a jury of twelve on October 17, 1960.

[fol. 87] FRED MONTEJANO, called as a witness on behalf of the State, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wesolowski:

The Witness: I am Fred Montejano, police officer assigned to the Homicide Section of the Detective Bureau. I have been a police officer for about three years and was so employed on January 30, 1960. On January 30, 1960, I had occasion to see Daniel Escobedo about 8:00 or 8:30 p.m. in the office of the Homicide Section, 1121 South State Street. When I first saw him, I believe Officer O'Malley and Detective Gerald Sullivan were present. Benedict DiGerlando was in another room. Conversation took place in a room to the left of the desk on the third floor in the Homicide Section which has about four rooms. The room where I saw Mr. Escobedo was to the left facing west. I told him that we had information that he had shot Manuel Valtierra and he asked me who said it and I told [fol. 88] him Benedict DiGerlando. He said, "He is full of shit, he did it." I said, "Would you like to face DiGerlando with your statement?" and he said, "Yes." We had DiGerlando in the room to the left of the room I had talked to Escobedo in and I was taking him into that room where DiGeriando was in, Chief of Detectives Flynn came in and took Escobedo to face DiGerlando. I then left the room about 9:00 o'clock. I next saw Danny Escobedo about 11:50 that day in the office of Lieutenant Buckley of the Homicide Section. Assistant State's Attorney Theodore Cooper and Court reporter Don Flannery were present.

Q. What, if anything, happened at that time?

A. Mr. Escobedo gave us a written statement regarding the part he played in the fatal shooting of Manuel Valtierra.

Mr. Schiller: Object as a conclusion of this witness, characterizing what was said by the parties, and I object to it. This is a conclusion.

The Court: Overruled.

The Witness: Daniel Escobedo was in the room with

Assistant State's Attorney Ted Cooper and Don Flannery and me for about 15 or 20 minutes at the most.

Q. What happened after that, if anything?

A. A statement was taken from Benedict DiGerlando regarding his part——

[fol. 89] Mr. Schiller: Object to what was said or what went on some place other than in the presence of the defendant.

The Court: Was this in the presence of the defendant?

The Witness: The defendant left the room, your Honor.

The Court: Sustained.

The Witness: After he was taken out of the room, I remained in the room. I have no idea where he was taken after that. I next saw him about a quarter to 1:00 or 1:00 o'clock on the morning of the 31st. He was still in the Homicide Office. Up to the time that he left the Lieutenant's Office neither I nor anyone in my presence made any promises of leniency or any promises of any kind to Daniel Escobedo. Neither I nor anyone in my presence spoke Spanish with Daniel Escobedo. Daniel Escobedo made his statement freely and voluntarily. I next saw Daniel Escobedo after 1:00 o'clock on January 31, 1960 when he was taken up to the lockup. I didn't see him the rest of that night. I next saw him in Boys Court on Sunday morning, the 31st.

Cross-examination.

By Mr. Schiller:

The Witness: January 30, 1960 was not the first time I saw Danny Escobedo in my lifetime. I had a discussion with him between January 20 and January 30, sometime during the middle of the week, about this case. This conversation took place in the street in the vicinity of Wentworth and 22nd. At the time of the conversation in the [fol. 90] street, I knew that Danny Escobedo had been picked up by the police and had been released by them.

Mr. Schiller: Q. At the time of that conversation on the street had you known that Danny Escobedo had been picked up by the Police and had been released by the police?

A. I came on this case on the——

Q. That calls for a yes or no answer?
A. Yes, sir.
Q. You had known that, is that correct?
A. Yes, sir.
Q. And yet you stopped him in the vicinity of 22nd and Wentworth on the street, is that correct?

Mr. Wesolowski: Objection as argumentative.
The Court: Sustained.
The Witness: On that occasion, I told him that if cared to make a statement regarding the killing of his brother-in-law, Manuel Valtierra, and he says no. He didn't say he didn't know anything about the killing of his brother-in-law, he wouldn't talk to me. I don't know what he had said in the police station before he had been arrested that date. That was the conclusion of my conversation with Danny Escobedo on the street. I didn't take him into custody on that occasion. I next saw Daniel Escobedo about 4:30 p.m. at 3703 Lexington and Detectives Thomas [fol. 91] Talty, Thomas O'Malley and Gerald Sullivan were with me. I didn't talk to Danny Escobedo and no one else did to my recollection. I don't recall Danny Escobedo having the occasion to say anything at that time. Nothing happened, we left. Danny Escobedo was still at home when I left, to my recollection. I don't know where he was living. He was at 3703 Lexington which is the home of the Valtierra family, his sister and brother-in-law. I understand it was Manuel Valtierra's home. Danny was there and I and these other policemen came to the house and I didn't say anything to Danny. As I recall, Danny Escobedo was on the sidewalk and I didn't go into the home, it was outside in the street that I saw him. None of the other officers talked to him when he was on the street to my recollection. We then left. The next time I saw him was the very same day, January 30th, about 8:00 to 8:30 P.M. in the office of the Homicide Section, 1121 South State Street. At that time, I knew how Danny Escobedo came to be there. I myself did not have anything to do with his being brought there, my squad leader, Gerald Sullivan, in charge of the car did. I do not know what Gerald Sullivan said to Danny and what Danny said to Gerald Sullivan. I talked to Danny when I saw him in the police station in the room to the left on the third floor of the Homicide

Division. This was 8:00 or 8:30. The first thing I said to Danny when I saw him was that I had received a statement from Benedict DiGerlando stating that DiGerlando [fol. 92] said that Daniel Escobedo had killed his brother-in-law. Danny says, "He is full of shit. He did the killing." This meant to me that that was a denial. As to how long I spent talking to Danny at the time of this conversation, we were in and out of the office for maybe a half hour or so. As to whether he was brought in or whether he was there when I came there, he was brought in handcuffed, just his hands. As to whether when I was in and out I had any further conversation with him, I asked him if he wanted to make a statement. Other than that, I did not to my recollection have further conversation with him.

Q. And did he make a statement to you?

A. At 11:50 P.M. he did.

Q. Prior to 11:50 he never said anything else to you?

A. Yes, he said, "Benedict DiGerlando is full of shit. He is the one that did it." Just as we were going to confront DiGerlando with Escobedo. Chief of Detectives Flynn came in and I—since he is my superior officer, he took Escobedo in to face DiGerlando.

Q. Do you know what happened when Danny Escobedo faced Benedict DiGerlando?

A. No; I wasn't there.

Q. This was about 10:00 o'clock—or about 9:00 o'clock, is that right?

[fol. 93] A. About 9:30. Between 9:00 and 9:30.

Q. You testified on direct examination earlier that Chief Flynn came in about 9:00 o'clock, isn't that right?

A. I don't recall testifying to that, sir.

Mr. Schiller: Well, could we have the reporter go back and check his notes and see whether or not it was 9:00 o'clock?

The Court: You may.

(Record read by the court reporter)

Mr. Schiller: Q. Is that true, was it about 9:00 o'clock that Chief Flynn was there?

A. I would say between that time. I don't know the exact time, I wasn't watching the time.

Q. And the next time you saw Danny Escobedo was almost two hours later, at ten minutes to 12:00, isn't that right?

A. 11:50 P.M., that's right.

Q. For those two hours you don't know where or what Danny Escobedo was, do you?

A. He was in the Homicide Section.

Q. That's all you know, you don't know who was with him, do you?

A. No.

Q. You don't know what was said to him, do you?

A. No, sir.

[fol. 94] Q. And the only thing you know about prior to that time was he said about the killing of Manuel Valtierra —the only thing he said to you was Bennie DiGerlando was full of shit, isn't that right?

A. Would you repeat that again? I think you have the names confused.

Q. Up until the time that you went in and ten minutes to 12:00, with Danny Escobedo, the only thing Danny Escobedo ever said to you was that the statement of Benedict DiGerlando, about his killing Manuel Valtierra, was full of shit, isn't that right, sir?

A. That's right, sir.

The Witness: At ten minutes to 12:00, two hours later, Danny Escobedo was seated in a room and was not still handcuffed. I was the only police officer present in that room. Assistant State's Attorney Cooper was there. I don't know how long Mr. Cooper had been in the room with Danny before I got there. There was a court reporter there but I don't remember whether he used a pad and pencil or a machine. To my knowledge, I was in the room from the minute Assistant State's Attorney Cooper started asking questions until he finished. I didn't leave the room. I was there during the entire question and answer period, I believe Lieutenant Flynn came in one time and Mr. Cooper stepped out.

[fol. 95] Q. You mean the question and answer period between Assistant State's Attorney Cooper and Danny Escobedo was interrupted when the questioner left the room?

A. I believe he was, sir.

Q. And did Danny Escobedo say anything when the Assistant State's Attorney left the room?

A. No, sir.

Q. About how long was he gone?

A. I have no idea.

Q. Do you remember, Officer Montejano, at what state of the questioning the State's Attorney left the room with Chief Flynn?

A. No, sir.

Q. Did he return then, the State's Attorney, after talking to your Superior Officer?

A. Yes, sir.

Q. Did your Superior Officer return, too?

A. No, sir.

The Witness: Chief Flynn was not present during any of the questioning of Danny Escobedo in the room with Mr. Cooper or Flannery and me. Officer O'Malley was present in the room with Bennie DiGerlando at the time he was quesetioned prior to the questioning of Danny Escobedo. To my recollection, he was the only one in the room with [fol. 96] Bennie DiGerlando. I don't know if Officer O'Malley was still there when Chief Flynn took Danny Escobedo into the room that Benny DiGerlando was in. I was going into the room with Escobedo when I saw the Lieutenant and he took over from there. I didn't see any more officers in the room with Bennie DiGerlando when Chief Flynn brought him in. I don't think they would have left a prisoner alone. None of the people were present when Danny made the statement with me present who were with Danny when he was taken into another room at 9:00 o'clock by my Chief with other officers. The statement of Daniel Escobedo took 15 to 20 minutes; I didn't keep track of the time. The statement was later reduced to writing. It wasn't typed as he spoke. It was taken down in shorthand, either by machine or by pen and pencil. It was not later written on black and white in English immediately after. I saw the statement on the 1st day of February at the State's Attorney's Office at 26th and California. Danny was there when the statement was shown to me. I don't know if this was the first time that Danny ever saw this statement. As to who was present, Danny, Assistant State's Attorney

Cooper, and myself. I believe Danny read the statement but I am not certain. I speak Spanish. I don't recall if I had a conversation with Danny at the time this statement was shown to him.

[fol. 97] Q. And Danny Escobedo refused to sign this statement, didn't he?

A. He pleaded the 5th Amendment.

Q. You didn't answer my question. He wouldn't sign this statement, would he?

A. He pleaded the 5th Amendment.

Q. Did he sign this statement?

A. I don't recall him signing any statement.

Q. Well, you saw the statement that you had been told had been written up, didn't you, there in the room with you?

A. Mr. Cooper had it, I believe, yes, sir.

Q. And you saw him give it to Danny for his signature, didn't you?

A. I believe he asked him if he wanted to sign it.

Q. And he didn't sign it, did he?

A. He pleaded the 5th Amendment.

Q. Well, did he sign it?

A. No, sir.

Q. That calls for a yes or no answer, Officer?

A. No.

Q. He didn't sign it, did he?

A. No, sir.

The Witness: I don't recall if he read it. I read the statement. Danny never said anything to me with respect to what he said at about ten minutes to twelve at 11th and [fols. 98-99] State on January 30th being the things that were written in the alleged confession that I saw in the State's Attorney's Office on the 1st of February. I heard Danny say orally certain things at the Detective Bureau. As to whether on February 1, he said those things that were written down were those things that he said, he didn't say anything. When I first saw Danny at about 8:30, there was no attorney present to my knowledge. I never saw an attorney by the name of Wolfson at 11th and State. I didn't know that there was an attorney trying to see Danny. As to where I was during those two hours when

Danny Escobedo was taken away from me by my superior, I was in the office of the Homicide Section, in other rooms.

Direct examination.

By Mr. Wesolowski:

The Witness: When I went to Boys Court on January 31st, Danny Escobedo was not there. I took Danny Escobedo to court on February 1st, a Monday. When we went to 3703 Lexington on the afternoon of January 30th, we met Officers Talty and O'Malley out on the sidewalk. Then we went to the vicinity of 27th and Wentworth. We did not all go in the same car.

* * * * * * *

[fol. 100] PATRICK J. FLYNN, called as a witness on behalf of the State, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wesolowski:

The Witness: I am Patrick Flynn, Captain of the 27th District, Warren Avenue, of the Chicago Police Department. On January 30th, 1960, I was assigned to the Detec-
[fol. 101] tive Division as Deputy Chief of Detectives working on the third watch and I was working on that day with hours four to twelve.

Q. During the course of that day did you have occasion to see the defendant in this cause, Daniel Escobedo?

A. Yes, sir.

Q. Where and when did you first see him?

A. I saw him on the 3rd floor, Homicide Office, 1121 South State Street.

Q. What time was that, if you know?

A. Approximately 10:30 P.M.

Q. Who was present when you saw him?

A. He was seated in a chair by himself in the main office

and there were other police officers that were some distance away at a desk. One was Jerry Sullivan.

Q. Do you know the other one?

A. I believe Thomas Talty may have been in the room.

Q. What happened when you saw Danny Escobedo?

A. I inquired of him as to his name and he told me that he was Daniel Escobedo.

Q. Was there anyone else present when you talked to him?

A. No, sir.

[fol. 102] Q. What did you say to him and what, if anything, did he say to you?

A. I informed him that I was the Deputy Chief of Detectives.

Q. Then what did he say?

A. He identified himself as Daniel Escobedo.

Q. Was there any other conversation at that time?

A. There was.

Q. What did you say to him and what did he say to you, if you know?

A. I asked him if he had hired an attorney or if his family employed an attorney or counsel.

Q. What did he say then?

A. Not to his knowledge.

The Witness: I asked him why he appeared to be so nervous and agitated and he told me he had not slept well in over a week. I asked him why. He told me that a fellow named DiGerlando was accusing him of doing the shooting when he didn't do the shooting but he might as well admit he did know what had taken place. I asked him what part he did take in the affair and he told me that he had discussed with his sister about her husband beating her at times and she agreed that they do something in order to get rid of him. So he attempted to buy a gun and he asked DiGerlando to procure a gun for him and DiGerlando told [fol. 103] him that he could. He wanted to know what kind of a gun and he said he would like some sort of a good gun, so he bought him a gun and charged him $50 for the gun. But Escobedo only had $41 in his possession. This transaction took place over on 18th Street in some tavern. Then they left the tavern and went over to his sister's home on 3702 Lexington Street and he went upstairs and explained

to the sister that this fellow did get the gun and wanted $9 more, so she came down in the hall with a $10 bill and with DiGerlando and Escobedo present she gave them $10 and they gave her $1. According to him, at this time there was a conversation about what action they were going to take and he told me that they went out in the car and parked about a block or a block and a half away on the next street. The Chevrolet car belonged to Escobedo, pardon me, DiGerlando. He told me that Chan and DiGerlando went over behind the house to await the return of Valtierra, the husband of his sister, from work, which would be around 11:30 or a quarter to 12:00. He told me the reason Chan went with him was because Chan could identify Valtierra and DiGerlando did not know him by sight. I asked him how long he remained parked there and he said it seemed like a long time. Then he heard some shots and he said, "They came running and I tried to start the car but couldn't start it. I was having trouble starting the car." Then he said DiGerlando told him to get out from behind the wheel [fol. 104] and DiGerlando moved in behind the steering wheel and started the car and they went out on the Congress Highway towards the loop where they separated.

Q. Was there any other conversation at that time?

A. He asked me why—he asked me to look in, he said, and talk to DiGerlando because he said that DiGerlando will tell the truth or could tell the truth after he related this story to me.

Q. Did you say anything to him then?

A. I called the attention of one of the officers, I believe it was Sullivan, and I went and asked where this DiGerlando was and DiGerlando was sitting in the next office.

Q. What did you do and what, if anything, did Danny Escobedo do?

A. Well, that was the last I saw of him that evening, that night. I went in and talked to DiGerlando.

Q. How long did you remain there with DiGerlando?

A. I would say that I talked to DiGerlando about—well, I would say about 25 minutes, and the reason——

Mr. Schiller: Object, your Honor.

The Court: Sustained.

Mr. Wesolowski: Q. After you talked to DiGerlando then what did you do, if anything?

A. Well, I sent out for a sandwich and something to drink for him.

Q. For whom?

[fol. 105] A. DiGerlando, and he told me that he was hungry.

Mr. Schiller: Objection.

The Court: Objection sustained.

Mr. Wesolowski: Sustained as to what DiGerlando told him?

The Court: That's right.

Mr. Wesolowski: Q. After you sent out for the sandwiches then what did you do?

A. DiGerlando told me——

Q. Don't go into that conversation with DiGerlando, just what you did yourself.

A. After the conversation with DiGerlando I notified the officers to contact the State's Attorney's Office.

Mr. Schiller: Object to what he said to the Officers, your Honor.

The Court: Sustained.

The Witness: The State's Attorney's Office was notified.

Mr. Wesolowski: Q. About what time was that, if you know?

A. I would say approximately 11:25 P.M.

Q. Now, just prior to your going to the Homicide Bureau where were you?

A. I was in the office of the Chief of Detectives on the 3rd floor, 1121 State Street.

[fol. 106] Q. At that time did you have occasion to see a lawyer?

A. Yes, I did.

Q. What was his name?

A. A Mister Wolfson, W-o-l-f-s-o-n.

Q. What time was it when you left the Homicide Bureau, Captain?

A. Are you referring to the time I left to go home?

Q. No, when you left the Homicide Bureau after going up there and having the conversation that you just related?

A. I left the building, it was about 12:20 A.M.

Q. When did you leave the third floor Homicide Bureau Office?

A. I left there about, I would say five minutes to 12:00 or 12:00 o'clock.

Mr. Wesolowski: That's all. You may inquire.

Cross-examination.

By Mr. Schiller:

The Witness: I left the Homicide Office at about five minutes to 12:00 or 12:00 o'clock and returned to my Chief of Detectives Office which is on the same floor. I may have gone back to the Homicide Department for a moment before I went downstairs, after 12:00 o'clock. I did not see Danny after that. The last time at the Homicide Department that I saw Danny was about 11:15 to 11:25. So from 11:25 on the night of January 30, I never saw Danny again until I saw him here in court. I did look into the room, I believe, when the Assistant State's Attorney was taking a statement to [fol. 107] ask him a question. As to whether I did see Danny again, I didn't look at the man but I knew he would be in the room, I felt he would be in the room. This would be during the time that a statement was being taken from him, sometime between ten to 12:00 and 12:15, something like that. As to whether I did return to the Homicide Section after I left at five minutes to 12:00, I did not enter the room. I looked in to call the attention of someone in there. I did get the attention of somebody in the room and asked him a question. I did not go inside the room, he came to the door. We did not leave the room. We did not converse in the room. He came to the door and I directed a question to him just at the doorjamb. I then went away and he returned to the room. The first time in my lifetime that I saw Danny Escobedo was about 10:30 on January 30, 1960. At 10:30 he was sitting in a chair by himself. There were other police officers in the room and Chan I believe was sitting over at the wall, it was in a chair. It was a room to the left of the room where the Desk man sits receiving Homicide calls. I don't recall seeing Officer Montejano there at the time. I don't recall talking to him at all that evening.

Q. Did you ever take Danny Escobedo from Officer Montejano's custody, Officer, or Captain?

A. No, sir.

[fol. 108] Q. Did you ever take Danny Escobedo into the room in which Benedict DiGerlando was sitting?

A. I did.

Q. You did do that?

A. Yes.

Q. About what time was it that you did that, Captain?

A. That was shortly after he had told me what had taken place and about five or ten minutes after I had identified myself to DiGerlando and started talking to DiGerlando.

Q. Was Danny Escobedo in the room when you started talking to DiGerlando?

A. No, sir.

Q. But you did take him, Danny Escobedo, into the room where Benedict DiGerlando was, is that right?

A. I had an Officer—who he was, I don't recall—bring Escobedo into the office and while in the presence of DiGerlando I directed several questions to him.

Q. To Danny Escobedo?

A. To Escobedo.

Q. And did he answer those questions?

A. He did answer the questions.

[fol. 109] Q. You first saw Danny Escobedo, you say, at 10:30, is that right?

A. Approximately 10:30.

Q. And you had talked to him for some time before this happened, isn't that right?

A. I talked to him for approximately 15 minutes.

Q. So that it was some time after a quarter of 11:00 that you took Danny Escobedo in to see Benedict DiGerlando, isn't that right, sir?

A. No, sir.

Q. About what time would it have been?

A. About 10 or 15 minutes, I would judge, after I had finished or completed talking to Escobedo.

Q. Well, about what time would you put that at, Captain?

A. Ten mintes to 11:00 or 11:00 o'clock.

Q. It was almost 11:00 o'clock when you took Danny Escobedo in to see DiGerlando, is that right, ten minutes to 11:00 or 11:00 o'clock?

A. I would judge that, yes.

Q. Captain Flynn, do you know who was with Danny Escobedo from 9:00 o'clock that night until 10:30, when you first saw him?

A. No, sir, I do not.

Q. You weren't even in the Homicide Bureau at 9:00 [fol. 110] o'clock that night, were you?

A. No, sir, at 9:00 o'clock I wasn't.

The Witness: I arrived at the building at approximately 3:30 or quarter to 4:00. As to when I came into Homicide the first time, I usually went in and picked up the reports of the day about 3:30 or twenty to 4:00, as soon as I entered the building to familiarize myself with what activity had taken place in the previous hours. The next time I went into the Homicide was approximately 10:30 p.m.

Q. Now, you said that Danny Escobedo told you that he had been—you say he appeared to be very exhausted?

A. He was nervous, he had circles under his eyes and he was upset.

The Witness: He had told me that DiGerlando had accused him of the shooting. He said that he did not shoot, that he was a part of the crime but he did not do any shooting. I remember everything of my conversation with Danny Escobedo. He told me he was waiting in the car for the return of Chan and DiGerlando, who were waiting in the rear of the home on Lexington Street. He said he usually came home around 11:30 or a quarter to 12:00. He said it seemed like an awful long time he was waiting there. He didn't specify the exact or approximate time. He did say his brother-in-law usually came home about 11:30 or a quarter to 12:00. He told me he had gone up to his sister's [fol. 111] house to get $10. He told me she came down into the hall. He told me he was present with DiGerlando when his sister came downstairs and gave him a $10 bill and he in turn returned a dollar. He asked me to talk to DiGerlando after I talked to him. I did go and talk to DiGerlando.

Q. Did you bring Danny Escobedo in with you then?

A. Not with me. I went in and talked to DiGerlando for five or ten minutes first and after I was speaking with him I then asked for Escobedo to be brought into the room itself and I directed a couple of questions, several questions,

to Escobedo and after he answered these questions, he walked from the—he was brought back out into the Homicide Office.

The Witness: Shortly thereafter, the Assistant State's Attorney took a statement with a court reporter. I don't know if it was written up. I looked in the room and saw the State's Attorney and the reporter there. I didn't see them taking anything down but I was present when the Assistant State's Attorney and court reporter came into the building. When I opened the door, I attracted the attention of the Assistant State's Attorney and he came to the door. When I looked into the room, he was sitting in a chair near the desk and the court reporter was sitting there. I didn't hear him address any questions to the people in the room and I [fol. 112] didn't hear Danny make any answers. It would be an assumption on my part to say that during that period of time questions were asked and answers were made. I never saw a document that was purportedly the statement of Danny Escobedo that he made to the State's Attorney on that occasion. I never compared the story that Danny Escobedo told me and that which he told the State's Attorney. I don't know if the statement that Danny Escobedo told me is the same statement that he told the Assistant State's Attorney.

Q. Captain, there was a lawyer at 11th and State, you have testified to in your direct examination, by the name of Wolfson, is that right sir?

A. You are right, sir.

Q. This Attorney Wolfson, why was he there?

A. I was advised about 9:30 that there was an attorney who was there representing Daniel Escobedo.

Q. Did you talk to that attorney?

A. He went to the second floor——

Q. Did you talk to him yourself, Captain?

A. I did.

Q. What time was it that you talked to him?

A. About 10:00 o'clock, 10:10 or 10:15.

Q. He was there, you know, at 9:30 and he talked to you before you——

[fol. 113] Mr. Wesolowski: Objection. There is no evidence that the Captain knew he was there at 9:30.

The Court: I thought he said 10:15.

The Witness: You asked me what time I talked to him.

Mr. Schiller: Q. Yes, but you said somebody told you that there was an attorney there at 9:30?

A. Approximately 9:30, quarter to 10:00.

Q. The attorney was there?

A. I didn't see him, I was told that there was an attorney at the desk at the Detective Bureau.

Q. And you were notified at what time he was there?

A. About, I believe it was 9:30, quarter to 10:00, I'm not sure of the time.

Q. You were advised that that attorney wanted to see his client, Danny Escobedo, is that right?

A. I was advised that there was an attorney there to represent Daniel Escobedo.

Q. Then you talked to him some 15 or 20 minutes later, is that correct?

A. I asked he be sent up to my office.

Q. And then you talked to him 15 or 20 minutes later, is that right?

[fol. 114] A. He came up to my office, yes, sir.

Q. And did you talk to the attorney there?

A. Yes, sir, I did.

Q. This was before you had even talked to Danny Escobedo, isn't that right, Captain?

A. That's right, sir.

Q. And did this attorney tell you that he represented Daniel Escobedo when you saw him?

A. He told me that a client of his was in custody. I asked him his name and he told me his name was Daniel Escobedo.

Q. And he said that he would like to talk to him, did he?

A. He told me he had been retained by him as his counsel, that he was his counsel.

Q. By him or his family?

A. He just said in that fashion. I recall he said retained as his counsel.

Q. Did he ask you to see his client?

A. No—at this point I asked how long the man had been in custody. That was the first knowledge I had that Escobedo was in custody or had been—was in the building.

Q. Did he say he wanted to see him?

A. I—at this time I asked how long he had been in custody.

[fol. 115] Q. My question is, did he say to you that he wanted to see his client?

A. He told me he had been retained by him.

Q. Did he say he wanted to see him, Captain?

A. I don't remember whether he told me he wanted to see him. He told me he had been retained by him.

Q. Did he come to 11th and State because he didn't want to see him, Captain?

Mr. Wesolowski: Object as argumentative.

The Court: Sustained.

Mr. Schiller: Q. You mean he never asked to see Danny Escobedo?

A. He told me he had been retained by someone and he told me—I asked him who had retained him and this—his answer to me, I felt that he wasn't playing fair, he wasn't telling me the truth. So that at this point I made it a point of seeing whether there was a person named Escobedo in custody and at this point I advised him that if the man was in custody and if he was not in the process of being questioned or investigated then he would be allowed to see him. However, when I returned from the Homicide Office, after learning that this Escobedo had not retained counsel, Mr. Wolfson was not in the office or in the building.

[fol. 116] Q. When you found out that he hadn't retained counsel, you say?

A. That's right.

Q. In other words, you determined that Attorney Wolfson was not Danny Escobedo's attorney, is that right?

A. I wanted to determine for myself, yes, sir.

Q. And you determined that he wasn't, is that right?

A. That's right.

Q. You determined that the family or nobody had, in behalf of Danny Escobedo, had asked that this Attorney Wolfson represents Danny, is that what you determined?

A. I asked Danny Escobedo if he had retained counsel or if he had knowledge of anyone retaining counsel for him, namely Wolfson, and he told me that he did not, he did not know.

Q. Did he ask to see Attorney Wolfson?

A. He did not.

Q. But Attorney Wolfson asked to see Danny Escobedo, is that right?

A. That's right, sir.

Q. At this point Danny Escobedo wasn't charged with anything, was he?

A. No, sir, he wasn't.

Q. He was just being held by the Police Department of [fol. 117] the City of Chicago, is that right?

A. He was being investigated.

Q. And he was in custody, wasn't he? He couldn't walk out the door, could he?

A. That is right.

Q. Now, Captain Flynn, I am sure you are familiar with what a writ of habeas corpus is?

Mr. Wesolowski: Objection.

Mr. Schiller: Q. You are familiar with what a writ of habeas corpus is, aren't you?

The Court: He may answer.

The Witness: Yes, sir.

Mr. Schiller: Q. Did you tell this Attorney Wolfson who had come to see you that if he wanted to see Danny Escobedo he should go to a judge and get a writ of habeas corpus to see him?

A. I did not, sir.

Q. Did you testify in this court room concerning this matter in a preliminary hearing a few weeks ago, Captain?

A. In this court room here?

Q. Yes?

A. Yes, I did.

Q. Do you remember on that occasion as to whether or not you said that a writ of—you told this attorney if he wanted to see Danny Escobedo he should get a writ of habeas corpus?

[fol. 118] Mr. Wesolowski: Objection.

The Court: Sustained.

Mr. Schiller: Q. Did you ever say that?

Mr. Wesolowski: Objection.

The Court: Sustained.

Mr. Schiller: Judge, I would like to be heard on that, if I may.

(And thereupon the following proceedings were had outside the presence and hearing of the jury)

Mr. Schiller: Judge, I have to lay a foundation for impeachment of this witness.

The Court: You asked him and he said no.

Mr. Schiller: Now I have to ask him in order to lay a foundation for impeachment whether or not he ever said that in this court room under oath. If he says no, he never said it, then I can impeach him.

The Court: Oh, I think he can lay the foundation.

Mr. Wesolowski: He has to ask him, were you asked this question.

The Court: And did you make this answer.

Mr. Schiller: I don't know exactly the words of it but I am asking generally speaking. Did he tell this lawyer he had to get a writ of habeas corpus to get him out. If he says no and I can't prove he said it, that is the end of [fol. 119] it, but he did say it and Mr. Novit has it in his notes. At this time I don't need the court reporter's transcript.

Mr. Wesolowski: I think it was Officer Talty or Sullivan, one of the officers, who knew that Wolfson was there. Out of all the officers in the Homicide Bureau on this case only one or two of them knew that Wolfson was there and had never seen him before. I think it was one of the officers that that remark might be attributed to.

The Court: I will overrule the objection and he may answer.

Mr. Schiller: Then I won't go into it any farther.

The Court: All right.

(And thereupon the following proceedings were had within the presence and hearing of the jury)

The Court: The objection is overruled. You may answer.

Mr. Schiller: Q. You never testified in this court that you had told Attorney Wolfson that he would have to get a writ of habeas corpus in order to see Danny Escobedo, is that right?

A. That's correct.

Mr. Schiller: That's all, judge.

Mr. Wesolowski: Your Honor, at this time I object to

this line—this last question, and subject to being connected up I move at this time it be stricken from the record.

The Court: I will hold the objection in abeyance.

[fol. 120] Redirect examination.

By Mr. Wesolowski:

Q. Captain, what was your conversation with this attorney Warren Wolfson?

A. Mr. Wolfson at this point quoted a statute with reference to a person in custody.

Q. Give us the whole conversation?

Mr. Schiller: I object, your Honor. I submit he is answering the question. If it isn't the answer the State's Attorney wants——

The Court: What did he say?

The Witness: He came to the third floor at approximately 10:00 o'clock, ten minutes to 10:00, and introduced himself as being namely Wolfson, and he said he had been retained as counsel by Daniel Escobedo who was now in custody.

Mr. Wesolowski: Q. And what did you say to him?

A. I asked him why he was in custody and when he was arrested.

Q. What did he say to you?

A. He told me that he did not know how long he had been in custody or where he was.

Q. Then what did you say to him, if anything?

A. I told him that I would make an effort to determine if the man was in custody and if he was in the building.

Q. Was there any other conversation at that time?

A. There was.

[fol. 121] Q. And just tell us what you said to him and what he said to you?

A. I determined that the man was in the building and he was being—he was under questioning relative to a homicide and I explained to him that the man had only been in the building a very short while and as soon as the officers had completed their questioning that he would be allowed to see him.

Q. And what, if anything, did he say to you then?

A. He started quoting some statute relative to his rights and demands as far as seeing his client.

Q. And then what did you say to him?

A. I went—that was the end of it.

Q. That was the end of the conversation?

A. Yes.

Q. Then where did you go and where did he go, if you know?

A. He walked out of the office. At this time I went over to the Homicide.

Q. Did you see him again after that?

A. No, sir, I didn't.

The Witness: When I went back to the room where Assistant State's Attorney Cooper was questioning Daniel Escobedo, I tried not to have anyone hear the question, I reduced my speech and whispered to him.

[fol. 122] Recross-examination.

By Mr. Schiller:

The Witness: I told this attorney that Danny Escobedo had only been in custody a short time. I believe he had been taken into custody about 8:30 or 9:00 o'clock. When I told this attorney this, it was about 10:00 o'clock or a quarter to 10:00. The attorney did not read me this law, he quoted from a law. I do not know the law that he quoted but he did quote some statute from the—some chapter relative to a lawyer's right to see his client if retained by him. I don't know if it was the right of a client to see his lawyer when he is in custody, I don't remember.

(Witness excused)

THEODORE J. COOPER, called as a witness on behalf of the State, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wesolowski:

The Witness: I am Theodore J. Cooper and I am an Assistant State's Attorney of Cook County and was so employed on January 30, 1960. I had occasion to go to 1121 South State Street, to the best of my recollection, about 11:30. This is the Police building that houses the Police Department, some divisions of the State's Attorney's Office and some court rooms. When I arrived, I went into the Homicide Division and at that time met a court reporter and took statements from various defendants that were in custody. I think the court reporter I met was Don Scroba. [fol. 123] He arrived after I did. We took three statements altogether.

Q. From whom did you take statements?

Mr. Schiller: Object, your Honor, to the materiality of it. In this case we are interested in Danny Escobedo, he is on trial and nobody else.

The Court: He may answer.

The Witness: I took statements from a man by the name of Chan, a man by the name of DiGerlando and a man by the name of Escobedo.

Mr. Wesolowski: Mark this People's Exhibit 1, please.

(And thereupon said document was marked as People's Exhibit No. 1, for identification.)

The Witness: I have seen plaintiff's Exhibit 1 before. I can't remember the exact day but the first time I saw this document was about two or three weeks ago or a month ago at a hearing we had here, I will take that back, I think I saw this document on a Monday following January 30 on the second floor of this building, State's Attorney's office. When I saw this document on the second floor of the State's Attorney's office, Officer Fred Montejano, defendant Escobedo, and myself were present. It was handed to me for the purpose of ascertaining whether or not Escobedo would

sign it after having it read to him. I asked him whether he would sign it and he said no, and therefore, I never read it [fol. 124] to him. I had occasion to read this document after I asked these questions, I don't recall the exact date but it was at a hearing in this court room. To the best of my knowledge this document contains all the questions that I asked and all the answers I received from Danny Escobedo on January 30, 1960. When I asked these questions, the court reporter Don, and this gentleman, Escobedo and myself were present.

Cross-examination.

By Mr. Novit:

The Witness: I reached the Homicide Bureau about 11:30 and I went right up to the Homicide Section, I believe which is on the 3rd floor. I spoke to one of the officers in charge there, but I don't recall his name. To the best of my recollection, I finally saw Danny Escobedo around 11:50. When I first saw Danny Escobedo, as I recall, he was sitting with another gentleman towards the back of the room that I entered to go through to what they call the Lieutenant's office. Danny was not in the Lieutenant's Office at this time. I proceeded to the Lieutenant's office and waited until Danny came into the office. I don't recall who brought him into the office. As far as I know, it might have been this gentleman sitting here, although I am not sure. Danny wasn't handcuffed at that time. When Danny came in, the court reporter and Officer Montejano were present. Captain Flynn was not present at the start that I recall. I introduced myself to Danny before I started questioning him. [fol. 125] As I recall, I sat down immediately and started questioning him. I have read Exhibit No. 1 which is the statement of Daniel Escobedo. There were two interruptions. One interruption occurred close to the beginning of the statement by a rap on the door, which I went to answer, and another interruption occurred later when the door opened and an officer came into the room, and I believe it was Officer Flynn. On the first interruption, I believe it was also Officer Flynn. I had conversation but not in the room, outside the room. As far as my recollection, the door to the room was closed when I was there. I walked outside

the room with Officer Flynn and had a conversation with him. On page 6 of the Exhibit there is a notation, "whereupon Lieutenant Flynn walked in and Mr. Cooper left the room with Lieutenant Flynn and returned." And on page 5, near the top there is a notation, "Whereupon Mr. Cooper left the room and returned." That was the occasion when the knock occurred. On the first occasion, the conversation was outside of the room, not in the doorway. It is very possible that on the second occasion the conversation was in the doorway. Officer Flynn at that time spoke to me in whispered tones. There is no notation on that court reporter's record of what was said in these tones. I don't know what you mean that this was an "off the record" conversation.

[fol. 126] Q. It doesn't appear on the record and it was taken in the vicinity of the court reporter, so it must have been off the record.

Mr. Wesolowski: Objection.

The Witness: Depends on what you mean by vicinity.

Mr. Wesolowski: There is an objection pending, your Honor.

The Court: He may answer. Objection overruled.

Mr. Novit: Q. The vicinity in this case is an open doorway of a room where questions and answers were being recorded, isn't that true?

A. That is possible.

Q. Well, it is the truth, this is what happened?

A. That's right, but would you—the vicinity of that doorway, its relationship to this court reporter——

Q. Very true.

A. The same type of vicinity.

Q. How big was this room?

A. To the best of my recollection it was 15 to 20 feet wide.

Q. And how long was the room?

A. About the same. Square.

Q. Approximately 15 or 20 feet square; is that right?

A. About that, yes. Closer to 20 feet, I would say.

Q. And the doorway was on one of these walls, is that right?

[fol. 127] A. That's right.

Q. And the place where the court reporter was sitting was how far from the doorway?

A. Almost the farthestmost point to the opposite wall near a desk.

Q. How far in feet was this court reporter from the doorway?

A. I would say between—over 15 feet.

Q. Well then, this conversation you had with Captain Flynn took place approximately 15 feet from the court reporter, isn't that true?

A. To the best of my recollection that would be correct.

Q. Then this conversation does not appear of record, does it?

A. No, it doesn't.

The Witness: I believe I remember every conversation that took place in that room that night. I do not think there were any other conversations that are not of record that took place in that room that night. I can definitely say there were no other conversations. I cannot remember every word of the conversation but I can remember having a conversation. I cannot remember every question and every answer. On the Monday following January 30 I was in the State's Attorney's office at 26th and California. At that time the statement came to me for the very first time. Danny Escobedo visited the office that I was using on that date. I had not read the statement before Danny Escobedo came to my office. I did not hand the statement to Danny, I told [fol. 128] him I would read the statement to him if he would sign it and I would read it page by page if he would initial each page. I didn't read the statement page by page because he said he wouldn't sign it. He said, "I will not sign the statement." I don't recall whether or not I read the statement myself on that date. I might have glanced through it but I don't think I read it. Actually, the very first time I thoroughly read the statement was in the court proceeding that was here.

(Whereupon Mr. Wesolowski stipulated that the date was September 19th.)

The Witness: I came to the conclusion at that time that everything contained in that statement was the same as was stated orally to me on January 30 at 11th and State. I do not remember everything word for word at that time.

(Witness excused)

DONALD FLANNERY, called as a witness on behalf of the State, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wesolowski:

The Witness: I am Donald Flannery, shorthand reporter for the State's Attorney's office, and have been so employed for 35 months. My duties are to take statements and grand jury testimony. When I say grand jury testimony, I mean verbatim reporting of the testimony presented before a grand jury. I was so employed on January 30, 1960. On [fol. 129] January 30, 1960, I reported to Mr. Cooper in the Captain's office of the Homicide Section at 1121 South State Street. After I reported to him, I waited for him to call me and when he called me in, I went in and took a statement. This was the statement of Danny Escobedo. When I walked in there, Officer Montejano was there, and Mr. Escobedo, Mr. Cooper, and myself were all present and Mr. Cooper asked the questions and Mr. Escobedo answered them. I took all the questions and answers on the stenograph machine. I have seen People's Exhibit 1 for identification before and this was when it was finished on February 1, Monday morning following this Saturday evening and Sunday. That was roughly between 10:00 and 11:00 o'clock in the morning. I have since had occasion to compare that copy with the notes that I made on January 30, 1960 and People's Exhibit No. 1 marked for identification is a true and accurate transcription of all the notes I took at 1121 South State Street on January 30. I took notes of everything said in my presence by Mr. Cooper to Mr. Escobedo and by Mr. Escobedo to Mr. Cooper. As to whether Mr. Cooper had any conversation with anyone else during that

time, he left the room once and once Lieutenant Flynn came in and he left the room with Lieutenant Flynn also and returned. I did not hear the conversation that they had, therefore, I didn't write any notes on the conversation.

[fol. 130] Cross-examination.

By Mr. Novit:

The Witness: During the course of my studies as a court reporter, I came across the term "off the record." As to what it means, when an attorney is taking a statement and tells me to go off the record, I go off the record. It could be that it means that a conversation may take place is not recorded in my notes. They could say off the record and leave the room and you don't know if they had a conversation outside or if they went outside for some reason and came back. When someone says off the record, I make a notation "off the record," on my transcript. If it said "off the record," my transcript would show "off the record" and then later on questioning resumes. I don't remember Lieutenant Flynn speaking to anybody in the doorway. If he did and I heard him, it would be on the record. I don't have the term "off the record" anywhere in my notes. I don't recall any conversation taking place between Captain Flynn and Mr. Cooper in this room or in very close vicinity to the room. I don't recall any other conversation that may have been in this room on the date which is not of record. I believe there was just one entrance. There may be one at the east end of the room, I'm not sure. As to approximately how big this room is, I am not very good at figures, but I would say it is probably maybe 30 feet long and 15 feet wide. It is a good sized room. I was sitting with my back to the doorway, [fol. 131] About ten feet from it. If the conversation in the doorway was loud enough, I would say I would have heard it. If somebody was talking very low, I couldn't have heard it. I don't recall anybody else in the room walk toward that doorway during the course of the time that I was there. I can't recall anybody else walking up to the door only when Mr. Cooper left the room and the other time when Lieutenant Flynn did. Mr. Elmer Rasmussen typed the transcript and he probably started about 9:00 o'clock Monday

morning following January 30th. I read my notes into a Stenorette machine and he plays back the recording and types from it. The figure "19" which is written above the figure "20" on page 2 of State's Exhibit marked No. 1 for identification was not made by me and I do not know who made it. I noticed the correction when I checked the copy, the transcript, with my notes but I had nobody explain the reason why the change was there. My notes do not reflect the correction. My notes reflect the 20th, the typewritten part of the transcript is exactly what my notes show. The figure "19" does not appear anywhere in my notes.

Redirect examination.

By Mr. Wesolowski:

The Witness: I do not recall any off the record discussions at the time that Daniel Escobedo was in the same room I was in with Mr. Cooper and Fred Montejano.

(Witness excused)

[fol. 132] Mr. Wesolowski: Call Leonard Skrleta to the stand.

(And thereupon the following proceedings were had outside the presence and hearing of the jury)

Mr. Schiller: This witness wasn't on the list of witnesses read by the State's Attorney. We are taken by surprise.

Mr. Wesolowski: I'm sorry, I thought he was. I have no objection to counsel talking to him.

Mr. Shiller: I would like to do that.

Mr. Wesolowski: In the meantime, I will call another officer, then we can take a recess.

The Court: You may call another witness then.

(And thereupon the following proceedings were had within the presence and hearing of the jury)

THOMAS O'MALLEY, called as a witness on behalf of the State, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wesolowski.

The Witness: I am police officer Thomas O'Malley for the City of Chicago, assigned to the Homicide Section at 1121 South State Street, where I was assigned on the first day of January 1960. On that date, I had occasion to see Danny Escobedo at about 9:00 o'clock p.m. at 1121 South State Street in the Homicide Office. It was in the middle room of the Homicide Bureau and he was with Officer [fol. 133] Montejano. Officer Montejano remained with Escobedo for about a quarter of an hour probably. Officer Montejano had a conversation with Escobedo. After the quarter of an hour, he walked away and I don't know where he went. I next saw Officer Montejano maybe a couple of minutes after that. Montejano walked away, and Escobedo was seated on a chair in the office. I talked to Escobedo. Then we brought him into another room and took him in front of DiGerlando. When I say "we," I mean Officer Montejano and I. This was approximately 9:30 to 9:40. We confronted Escobedo with DiGerlando. Escobedo denied it and he says that DiGerlando was involved, that he was the one who did the shooting. He said, "You are full of shit, you did the shooting". He said this to DiGerlando. He then came out of the room with him. After that I didn't have any other conversation with him. I saw him again in the office, in the same room, the middle room in which I originally saw him in. I was at 1121 South State until sometime around 2:00 A.M. the following morning. From the time I finished my conversation up to about midnight, he was in the middle room as I so stated, seated in a chair. I don't recall if anyone was questioning him or talking to him at that time. As to whether I heard any threats or promises in my presence, I didn't hear any threats. When he talked to me the first time, he told me whatever he told me at that time freely and voluntarily.

[fol. 134] Cross-examination.

By Mr. Schiller:

The Witness: The first time I saw Danny Escobedo he told me what Bennie DiGerlando said about his killing his brother-in-law, that he was full of shit. That was the first time he talked to me. There were no threats made at that time. I told him the story I got from DiGerlando and he said he was full of shit. Between 9:30 and 10:00 o'clock Fred Montejano and I took Danny Escobedo and confronted him with Bennie DiGerlando. The Fred Montejano I am talking about is seated in this court room. Captain Flynn was not there at the time I am talking about. I saw Captain Flynn about 10:40 or 10:45, right in that area. Officer Montejano was in the area there. I don't recall if Officer Montejano was in the same room as Danny Escobedo. I was in another room myself. Somebody was watching him so he wouldn't walk out of the office, but I don't recall who it was. As to whether Danny told me anything else other than Bennie DiGerlando was not telling the truth when he accused him of killing his brother-in-law, that's all the conversation I had with him. As far as I know Danny Escobedo only said to me that what Bennie DiGerlando said wasn't so, and, but he said he rode over to that location with him. That is when he said to me that he didn't do it, that it was DiGerlando that did it. As to who was in the room at the time of this conversation, I was talking to him [fol. 135] and Officer Montejano who was in the rom at the time too, but I was talking to him alone. I couldn't say for sure how many other officers were in the room at the time. I was talking to him. It is a big room in size. We have a passageway there. I couldn't say whether there were more than three or four officers. As to how many officers were in the room when I confronted Danny Escobedo with Bennie DiGerlando, Officer Montejano and myself, and I don't remember anybody else. I did not see an attorney Wolfson that night. I don't know whether or not an attorney was trying to see his client, Danny Escobedo. Never heard of anyone trying to see him. If you were to tell me that Officer Montejano never was in that room or testified that he was never in that room with Bennie DiGerlando and Danny Escobedo, I would say that he was standing there in the

room and I am sure of that. I could not hear everything that Officer Montejano talked to Danny Escobedo about when I was around in the room when they were talking. As to whether I could hear any of the Spanish that was spoken, I didn't hear them speaking Spanish.

(Witnessed excused.)

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Wesolowski: At this time, your Honor, I will offer in evidence People's Exhibit 1, marked for identification.

Mr. Schiller: We object, your Honor, and I would like to be heard on the matter. * * * Judge, I had made a motion—I had made an objection to the statement of the State's At-
[fol. 136] torney, State's Exhibit 1, for identification, and as my reasons, your Honor, for objecting to its admissibility is number 1, of course, he was deprived from seeing an attorney, and that is borne out, your Honor, by the State's witnesses.

Captain Flynn said his attorney tried to see him and he wouldn't let him see him. It was subsequent to that time that the State's Attorney took a statement from Danny Escobedo. Another objection I have to it is that it is unsigned. The document was never read to Danny Escobedo, actually he has no knowledge of what is contains. We have no way of knowing that it is Danny Escobedo's statement because there was never any indication from him that it was a statement that he made.

We have, of course, testimony in a preliminary hearing that it wasn't given freely and voluntarily, that they had promised to let him go home, if he would make a statement.

My final objection to it is the fact that it is not a true and correct copy. From the testimony of the State's own witnesses it is not a true and correct copy of the statement that was taken down at 11th and State. There were changes made. We have no knowledge of who made the changes but we do know that the changes were made were not in the court reporter's notes.

For those reasons, your Honor, I am sure you must agree that it couldn't be, by any stretch of the imagination, admissible as evidence against Danny Escobedo because it
[fol. 137] was not even what he said, based upon the testi-

mony of the State's witnesses. For those reasons I object to it.

Mr. Wesolowski: Your Honor, as to the voluntariness that matter has been ruled on by the court at a previous hearing and that would negative all of counsel's objections as to the refusal of counsel, insofar as any other indication that it was given involuntary.

As far as counsel's other objections as to signing, the document speaks for itself. The witnesses all said it was not signed, the man refused to sign it. The statement does not have to be signed. There is a very recent Illinois case on that, I think it is in the 18th volume.

The only question that comes to my mind is as to the entry of January 19th and 20th 1960, which appears on page 2, which the court reporter said didn't belong there. I have no idea how the 19th got there and the court reporter says he didn't know and it is correct and accurate without it.

At this time I will ask leave of court to delete the words "19th". It is filled in by pen.

Now, that document has been in the hands of many people. However, the court reporter says except for that one entry or one mark this is a true and correct transcription of everything that was said between Mr. Cooper and the defendant at that time.

On that basis, your Honor, we feel that it is admissible [fol. 138] and should be admitted.

Mr. Schiller: In answer to that, Judge, not only has the document itself been in the hands of many people all with the State, of course, but also there has been no showing by the State in whose hands this document has been.

We don't know whether or not the court reporter's notes also, in this long 10 month period, hadn't been in the hands of somebody else either, because the court reporter can't remember everything that was said and he had to refresh his recollection from checking his notes with the document.

I don't know whether they were altered also.

I don't know if Captain Flynn testified in the preliminary hearing to the fact that he wouldn't let Danny Escobedo's lawyer see him, I don't know if he testified that way or not.

The Court: He also testified that he asked Escobedo was Wolfson his attorney and Escobedo said he didn't know anything about it.

Mr. Schiller: Judge, it will be shown, and I would like—

The Court: I remember the testimony on that point.

Mr. Schiller: Yes, that's right. And I would like to make an offer of proof, if I may, Judge, before your ruling on this that Warren Wolfson represented Danny Escobedo in a personal injury case prior to this time, prior to this time, and was his lawyer.

[fol. 139] The Court: I am telling you what the testimony here by Captain Flynn was; that he came and asked Escabedo and said, is Wolfson your attorney. He said he didn't know anything about it.

After Wolfson spoke to the Captain, the Captain said he wanted to ask Escobedo about him. In the preliminary hearing, of course we have heard this before, there was testimony by Escobedo, which hasn't been denied on another hearing, that he saw Wolfson.

Mr. Schiller: That's right.

The Court: And Wolfson told him to keep his mouth shut.

Mr. Schiller: No.

The Court: He told him not to say anything but then he went on and—he has testified to that under oath.

Mr. Schiller: That's true.

The Court: The motion will be overruled. I think there is testimony that that 19 should be deleted. There is no accounting for it. The court reporter under oath said that the 20 reflects the statement from his notes. There is no 19 in his notes.

The Court will order that 19 deleted. I don't know why it should be in there. But it is an unsigned statement and for what it is worth it may be admitted.

Mr. Wesolowski: I have deleted it.

The Court: All right.

[fols. 140-143] (And Thereupon People's Exhibit 1 for identification was received in evidence.)

* * * * * * *

[fol. 144] PLAINTIFF'S EXHIBIT No. 1

(Whereupon Plaintiff's Exhibit No. 1 was read to the jury, which exclusive of the caption was in substance as follows:)

"My name is Daniel Escobedo and right now I'm staying at my sister's house, 3703 Lexington. On January 20th I lived at 2741 South Princeton with my wife's sister, brother-in-law and her two children. My wife's name is Judith Ann Escobedo. I knew Manuel Valtierra; he was my brother-in-law through marriage to my sister, Grace. As to whether I got along with him, we never got along as far as that. I never actually had any fights with him, the most we ever had was an argument. Arguments concerned his beating up on my sister all the time. As to whether I ever talked to my sister Grace about Manuel Valtierra, she always talked to me and my family she always was telling us she was going to leave him but she never did. As to what happened on January 20, 1960, I met Bennie Gerlando at Raziano's Bowling Alley. I was going to buy a gun off him. I was waiting for him with Bobby Chan inside the bowling alley, we were bowling. The bowling alley, [fol. 145] Raziano's is located at "25th Place and Wentworth. We got there about a quarter after six. Prior to that a couple of weeks before, I asked him if he knew anyone who was in the process of selling a gun. He said he knew somebody who had a .32 automatic who wanted $40 or $45 for it. I told him, all right, you get the gun. He went and came back about seven, he said he just got off work; he's a butcher or something like that on the south side. He didn't have the gun when he first came. I don't know where he went; he came back and said I can't find the .32, but I got a .25 automatic if you want to buy that. I said how much is that one, he said $50. I gave him $41, and he gave me the gun. Then, we drove to my sister Grace's house and got the $9 more. We got to Grace's house after eight sometime, but I couldn't say just directly what time.

Q. Did you have the gun then?

A. I had the gun, yes.

Q. Was it loaded?

A. Sir?

Q. Was it loaded?
A. It had two shells in it.

(Whereupon Mr. Cooper left the room and returned.)

Mr. Cooper: Q. Where is that gun now?
A. Well, that night we got picked up, I left it at my sister's house on the north side.
Q. Which sister?
A. That's Hope Huey.
[fol. 146] Q. Has she got the gun now?
A. I don't know, my brother-in-law was supposed to throw it away because he didn't want the gun in the house.
Q. Did you go back to——
A. My sister's home?
Q. To Grace's home?
A. Later that night, yes.
Q. What time did you get back?
A. I don't know exactly, must have been about 11, somewhere around there.
Q. Why did you go back?
A. Well, Bennie wanted to see how the backyard was and the alley and everything else.
Q. Why?
A. Because during that time that—we skipped a lot here.
Q. What did we skip?
A. After he sold the gun, we went and got the money off my sister.

(Whereupon Lieutenant Flynn walked in and Mr. Cooper left the room with Lieutenant Flynn and returned.)

The Witness: I sent Bobbie upstairs and he knocked on the door and talked to my sister and my sister says, I'll send the money down with Butch, her son. He brought $10 down because she didn't have change and I gave Bennie the $10 and he gave me a dollar back. "Then we drove to the [fol. 147] tavern on 18th Street on DesPlaines, on the corner and sat there having a few beers. I told Bennie what I was going to do, I was going to shoot my brother-in-law because he was always hitting on my sister and everything. After a few beers I had told him, see, I wasn't sure if I could do it or not. So he says, well if you got

any money, I'll do it. I said how much, and he said $500. I said, I haven't got the money but maybe I can try and borrow the money for you. So, the understanding was he was going to do it after that. I didn't promise to pay him $500 for doing it; I told him if I had the money I would give it to him. As to whether I told my sister Grace about it, when we got there the last time, before the shooting, my sister Grace asked what are you going to do? I already told her I was going to buy a gun and she wanted to know if I bought it. I didn't tell her why I was going to buy a gun, I guess she probably figured it out why. As to what I think she probably figured, she knew me and her husband weren't getting along. When we got there she said did you buy the gun? I said, yes, and showed her the .25 automatic I bought. I said, Grace, I'm not going to shoot him, Bennie is. I think it was after 11 o'clock. She didn't say anything. I didn't ask her for $500. As to whether I told her it was going to cost $500, I didn't tell her anything like that because I didn't talk to her. Bennie and her [fol. 148] talked while me and Bobbie "stood back. They talked in the front hall. She was in her night robe so she had to stay in the inner room. I heard the shooting. When the shooting occurred I was a block north of her house, parked on the left side of the street because it was a one way street. I understand it was Bennie's car. I was driving. It was a primer treated, '49 or '51 Chevy, one of those long backs club coupe. I heard the shots. Prior to hearing the shots, when I parked, Bennie and Robert went out of the car and the way I understand it, Bobbie was supposed to stand about two or three houses away to watch and see if anyone would come out and Bennie was supposed to do all the shooting. My understanding was that their purpose in getting out of the car was to shoot my brother-in-law. As to whether this definitely was the understanding, Bennie said I didn't miss, you know. As to whether Bennie knew my brother-in-law, he seen him a few times but not to talk to him. As to who told him about where he could get to shoot my brother-in-law, I was going to do it myself and I told him how and when he was going to be there. About the time, I wasn't sure, I said he might be there any time after 12. He would be behind his home parkin[illegible]ar in the garage. This was

a regular habit of my brother-in-law when he lived there. He would park his car in the garage and go up the back way. As to whether I knew this, not actually, one time I happened to be there and I was at the house "when he [fol. 149] parked. As to whether my sister told me this is what he did every night, well, she said something like that, yes. As to whether she told me what time he came home every night, there was no telling what time, it could take him fifteen, twenty minutes to get home. His house was two blocks off Congress and he worked over at the Union Depot. She did tell me he parked the car in the garage and came up the back way. After I heard the shots, I counted two hundred. Bobbie came first and no more than twenty seconds before Bennie came. They got in the car and I tried starting the car which I couldn't start. Bennie says I'll drive and I know how to start it. He started it and we went down Congress Expressway and he dropped us off at Congress and State. As to whether he told what happened, he said I seen him fall. As to whether he had a gun with him at the time, he had a .38 when we left Raziano's bowling alley. As to whether he had a gun after the shooting, I guess so, I don't know, I didn't see it after that. He asked me when I would be able to get any money, and I said I don't know, meet me in the tavern tomorrow and if I got the money I'll give it to you and if I don't, you'll have to wait. As to whether I met him, no, I was in custody then. As to how much money he wanted, I told him I couldn't give him much, I mean right away. As to how much I was suppose to, it didn't matter, as long as I [fols. 150-156] "brought him something. There was no fixed amount about how much I was going to bring or anything like that. After he dropped us off on the corner of State, we went into the Arcade on the corner and had a coke, Robert and me. Robert didn't say anything about what happened until we got by my sister's house, and he said he was standing over there and as soon as he heard the shots he came running and I ran too, that's what he said. As to whether I can clarify that a little bit, well, Bobbie was standing over here and Bennie must have been by the garage. When he shot my brother-in-law, and when Robert heard the shots he was looking around, so Bennie must have come running out of the thing, the gangway

or wherever he was by the garage and when Bobbie seen him running, he ran. Bobbie told me when he saw Bennie running he ran."

Mr. Wesolowski: And the statement is not signed.

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[fols. 157-169] STIPULATION AS TO AGE OF DEFENDANT

(It was stipulated between the People of the State of Illinois and the defendant that the defendant is now 22 years of age.)

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[fol. 170] WARREN WOLFSON, called as a witness on behalf of the defense, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Schiller:

The Witness: I am Warren Wolfson and I live at 2150 Lincoln Park West, Chicago, Illinois and I am an attorney. I am licensed to practice in the State of Illinois and have been so licensed for three years. I know Danny Escobedo and represented him in a personal injury case. He had this accident case which I represented him in 1959. This case is still pending. I still represent him in the civil matter.

In the early morning of January 20th 1960 I represented Danny Escobedo. On or about that date, I obtained a writ of habeas corpus on behalf of Danny Escobedo. He had been in custody. I obtained a writ of habeas corpus to take him from Police custody before they could charge him with a crime. About a week or so later, about January 30th 1960, I was still Danny Escobedo's lawyer. On that day I received a phone call and pursuant to that phone call I went to the Detective Bureau at 11th and State. The first person I talked to was the Sergeant on duty at the Bureau Desk, Sergeant Pidgeon. I asked Sergeant Pidgeon for permission [fol. 171] to speak to my client, Danny Escobedo. I had

been informed earlier by phone that he was in the Detective Bureau. Sergeant Pidgeon made a call to the Bureau lockup and informed me that the boy had been taken from the lockup to the Homicide Bureau. This was between 9:30 and 10:00 in the evening. Before I went anywhere, he called the Homicide Bureau and told them there was an attorney waiting to see Escobedo. He told me I could not see him. Then I went upstairs to the Homicide Bureau. There were several Homicide Detectives around and I talked to them. I identified myself as Escobedo's attorney and asked permission to see him. They said I could not. At this time there had been no formal booking and Danny Escobedo had not been charged with a crime. The police officer told me to see Chief Flynn who was on duty. I identified myself to Chief Flynn and asked permission to see my client. He said I could not. As to what time that was, I think it was approximately 11:00 o'clock. He said I couldn't see him because they hadn't completed questioning. As to whether I got an opportunity to see Danny Escobedo that night, for a second or two I spotted him in an office in the Homicide Bureau. The door was open and I could see through the office. As to whether I attempted to talk to him or say something to him, I waved to him and he waved back and then the door was closed, by [fol. 172] one of the officers at Homicide. There were four or five officers milling around the Homicide Detail that night. As to whether I talked to Captain Flynn any later that day, I waited around for another hour or two and went back again and renewed by request to see my client. He again told me I could not. He did not tell me that he made an investigation and determined that I was not Danny Escobedo's lawyer. He never told me that. There was an investigation at a later time and his report stated that, but he never told me that. I filed an official complaint with Commissioner Phelan of the Chicago Police Department. I had a conversation with every police officer I could find. I was told at Homicide that I couldn't see him and I would have to get a writ of habeas corpus. I left the Homicide Bureau and from the Detective Bureau at 11th and State at approximately 1:00 A.M. I had no opportunity to talk to my client that night. I quoted to Captain Flynn the Section of the Criminal Code which allows an attorney the right to see his

client. This is the Code where rights are given to a client in custody to talk to his lawyer.

Cross-examination.

By Mr. Wesolowski:

The Witness: I don't remember the exact time I got to 11th and State, but it was around 9:30 or 10:00 o'clock. I testified at a preliminary motion in connection with another defendant.

(Whereupon proceedings were had outside the presence [fol. 173-176] and hearing of the jury.) And thereupon the following proceedings were had within the presence and hearing of the jury:

The Witness: I testified previously to the same matters I am testifying to now. As to whether I recall telling the court that I got to 1121 South State Street at 10:30 p.m., it was around 10:00 o'clock; I don't know whether I said that or not. I got this phone call about an hour before I arrived at the Bureau. The mother of another defendant called me. Flynn told me that I could see my client after they were through with their investigation or words to that effect. He did not tell he would determine whether or not. I was his lawyer and if an investigation was in fact going on. I expect to get a fee from the personal injury case.

(Witness excused)

Grace Valtierra, called as a witness on behalf of the Defense, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Novit:

The Witness: I am Grace Valtierra and I live at 2546 South Wentworth. I am Danny Escobedo's sister and was the wife of the deceased, Manuel Valtierra. I was married to Manuel for 11 years. ***

[fol. 177] I went back and sat down and my stepdaughter [fol. 178] was sitting on the large couch with me and my stepson was at the small couch and all of a sudden we heard a desperate knock at the back door and I told my son, "Go see who is knocking". He came back scared and said: "Ma, nobody answers". I said, "Go ask again who is it". He said, "I did, but nobody answers". Then I said, "You are a fraidy-cat". My stepdaughter and I both went and my son followed. I asked "Who is it" and nobody answered. We lived on the second floor and we have a built-in porch. My daughter and I both looked out the window at the same time and we looked down and saw my husband laying on the sidewalk, so we all ran to the door and started running downstairs. This was after 12:00 o'clock. Just a few minutes after the last phone call I heard the desperate knock on the door. We were waiting for the late show to come on and the late show comes on a few minutes after 12:00 o'clock. Upon completing my telephone conversation with Danny I went back and sat on the couch. I was sitting just a few minutes before I heard the knock. No sooner had I sat down and got comfortable when I heard the knock. I would not defend a killer of my husband if it happened to be my brother. If my brother was the killer of my husband I would want to see him punished for killing him. I would not do anything here today to defend the killer of my husband.

* * * * * * *

[fol. 179-182] DANNY ESCOBEDO, the defendant herein, having been duly sworn, was examined and testified in his own behalf, as follows:

Direct examination.

By Mr. Schiller:

* * * * * * *

[fol. 183] Before I left the tavern that night I made the last phone call to my sister's home and Grace answered the phone and I talked to her. I asked her to put Judy on the

phone and she said no. I told her she had no right to be stopping me from talking to my wife and for her to keep her nose out of my business. I told her it didn't concern her what I wanted to talk to my wife about. This was the end of the conversation when she hung up. We left the tavern right after the phone call. When I made the final phone call it wasn't quite 12:00 o'clock. When we left the tavern, I asked Bennie if he would take me up to my sister's house on the north side, Hope Huey. He asked me where she lived on the north side and I told him on Lawrence right off Marine Drive. He said it was too far and too late and he wanted to go home, but he would drop me off downtown where I could catch the El. He left Chan and me off on State and Congress. Chan was going to my sister's house with me and he had been to my sister's house before. My sister Hope Huey's husband works the evening shift to around [fol. 184] 12 or 1:00 o'clock when he gets off work. I was supposed to be there to watch her daughter while she went to pick him up. When Robert Chan and I were left off downtown, Robert Chan told me he felt a little hungry. There was a penny arcade on the corner called the Super Arcade, and we had a couple of hot dogs and root beers there. After we finished eating, we left for the north side. We caught the El that stops there between Harrison and Van Buren. We went down the elevator stairs to the subway. We took the subway north. My sister Hope Huey was not at her house when we arrived, she had just left. The way her husband's cousin said, she had just stepped out as we were coming in. The cousin was going to baby sit for her until the time we came in. He stayed there when we got there. It couldn't have been too much after 1:00 o'clock when we arrived at my sister Hope Huey's house on the north side. Around 2:30 that morning seven Police Officers walked in my sister's home while we were at Marine Drive and Lawrence Avenue. I was arrested by the police officers. They entered my sister's home and they lined us on the wall with out faces to the wall and they searched us and they asked us questions of where we were about two hours before then. I told them the story I told the ladies and gentlemen of the jury. They were not writing anything down when I told them the story. I don't know the police officers and never have seen them since. They took me

down to the Fillmore Station. We arrived there just after [fol. 185] three o'clock in the morning. We were released on the 20th day at about 5:00 p.m. in the evening. We were there over 14 hours. I was asked by the police officers at the Fillmore District about my brother-in-law. I told him I didn't know anything about him being murdered. I was released the following day at 5:00 o'clock in the afternoon. The night I was with Robert Chan and Benedict DiGerlando I did not purchase, and did not offer to purchase a .25 caliber gun from Benedict DiGerlando or any body. I did not give him $41 for a gun. I didn't have any money. I didn't give him any money for a gun. I never had a .25 caliber gun. I never saw a .25 caliber, .22 caliber, .32 caliber or .38 caliber gun that night. I did not see anyone in my presence with one. After I was released by the police officers, I was stopped one evening on Wentworth by two police officers when they called Chan and me over to the car and asked us if we were ready to make a statement. They told us, "Are you ready to make a statement now, and I said, "I don't know what you are talking about." We walked away from them and they went around the corner and went in some other direction. One morning when Robert Chan and I were sitting in the front room of his home, two detectives came and talked to his mother and told his mother that they were going to pick us up for more questioning. When I heard this, Robert Chan and I went down to 11th and State to the 2nd floor to the desk sergeant of the Detective [fol. 186] Bureau. I said I heard that they had warrants out for our arrest. I told them I was ready to surrender myself for whatever warrant they had on me. The sergeant told me they had no warrants out for our arrest and we shouldn't even be there, so Chan and I left. On January 30, 1962 police officers came in the door of my sister's home and asked my sister's name and when she told them her name was Grace Valtierra, they said they had a warrant for her arrest. I didn't know the police officers. This was my sister who testified here earlier in the trial. They put handcuffs on her and when I saw them do this, I went to the kitchen and asked what it was all about. One officer turned around and asked me my name and when I told him, he said Turn around," and as I turned around, he put handcuffs behind my back and handcuffed me. They took us down to the

police car, and put me in the back seat with one detective and sat my sister in the front between two detectives and drove us to 11th and State. This was around the hour of 8:00 o'clock p.m. We were taken to the Homicide Section at 11th and State and I was put in one room and my sister was led to another. I did not see my sister after that that night. When I was put in the room, I saw police officers one of whom I knew, Fred Montejano, who is seated here in the Court room. He came in shortly after I was handcuffed to this chair. I was the only one that the police had [fol. 187] in that room at the time. Officer Montejano came in and asked me if I was willing to make a statement of the murder of my brother-in-law and I told him I didn't know anything about it. After I said that, he said that there was someone in another room that could prove that I did the killing. He didn't tell me who that someone was. I told him to take me in to that certain person, whoever he said was accusing me and let me tell him. I did not say whether or not that person was telling the truth, I said, "I don't believe that and I don't believe you have anyone over in that other room and I don't know anything about it. He did not take me to the other room. This was around a quarter of nine.

Q. Did you ask at that time these officers to do anything for you, sir?

A. I did. I asked them if I can have either them or myself call a lawyer.

Q. What did they say to you?

A. They says, "You'll get to see him later."

Officer Montehano left me about ten minutes after he questioned me and that was close to 9:00 o'clock. After Officer Montejano left me, the next time I saw him was when I was going to make the statement which was right before 12:00 o'clock. From the time between nine and shortly before 12:00 o'clock, I didn't see Officer Montejano again. I saw other police officers but I don't know who they are, just that there were three or four coming in every few minutes [fol. 188] asking me questions. Each of these other officers that came in asked me questions and I told them that to the best of my knowledge the answer they wanted I couldn't answer. I don't know the names of these officers. As to when I saw Captain Flynn that night, I don't even know

the man. The first time I saw him was up here on this chair here testifying. That was the first time I recognized him as Captain Flynn. He could have been one of the officers that came in and talked to me that night.

Q. Did you have an opportunity to see your lawyer?

A. No, I didn't.

Q. Did you tell the officers there who your lawyer was?

A. I told them his name.

Q. What name did you tell them?

A. Warren Wolfson.

Q. Had Warren Wolfson actually been your attorney?

A. Well, he was handling the CTA Accident case for me.

Q. The one where you broke your collarbone?

A. Yes.

Q. Had he had a writ of habeas corpus that got you out of custody a week before that?

A. Yes.

Q. Did you tell these officers that you wanted to see him?

A. Yes, sir.

[fol. 189] Q. Did you ever get a glance that evening of Warren Wolfson?

A. Yes, sir, while I was sitting in the room where this desk is.

Q. Did you get a chance to say anything to him?

A. No, sir.

Q. Why didn't you?

A. I was told not to say anything to anyone.

Q. Do you know who the person was who told you to say that?

A. I don't remember the Officer's name.

Q. He was a police officer, was he?

A. Yes.

Q. And did Warren Wolfson get a chance to say anything to you?

A. No. He made a motion with his head.

Q. And then what happened?

A. Then they let him out of the room.

Q. What happened, could you see him anymore?

A. I didn't see him after that.

After that occurred, they took me into the room to the right of where I was in the room where I seen my lawyer and I was standing next to Chan at the time that one officer

came in and asked us more questions. I talked to Chan and he told me as I was standing next to him that these police officers had slapped him around and he was afraid that they were going to come back and slap him again and they [fol. 190] had told him if I and he would make a statement accusing Benedict—that was the first time I knew that Benedict was in custody even, as I hadn't seen him up to that time. The first person that told me that Benedict was in custody was Chan. They told Chan that if he and I would make a statement they would see that we would go home that night. At this point, the officers hadn't talked to me about that. I didn't know what to do and I told Chan, "Well, what do you think?" He said, "Well, we can go home." Then we were separated, I was taken kittycorner in the room where I was with Robert Chan. The police officers again questioned me. I don't know who they were but it wasn't Officer Montejano. This one officer after he finished talking to Robert Chan came to me and asked, "Are you going to make this statement now?" I said, "Well, I don't know." He said, "Well, you will get to go home if you do." I said, "Then I am ready to make a statement." This was a little before 12:00 o'clock. I was taken into a room where Fred Montejano accompanied me and when we got into the room, the State's Attorney and court reporter were sitting there. The State's Attorney was sitting in front of me and the court reporter was on the side and they asked me about what happened on that day. I told them exactly what this police officer told me to say. As to what this Police Officer told me to say, it is the statement that was read to these ladies and gentlemen of the jury earlier today. I mentioned [fol. 191] in that statement that I had bought a .25 automatic gun. As to whether there was any discussion in that statement with me about that .25 automatic gun other than what was in the printed statement that was read to the ladies and gentlemen of the jury, while I was in the room giving the statement, the State's Attorney stepped out. While Ted Cooper stepped out of the room, one of the officers, I don't know who he was, walked in and told me, "Tell them it was a .38 pistol that killed your brother-in-law." Prior to that time they had told me it was a .25. As to whether, after the State's Attorney came back into the room and continued with the statement, did I tell them that

I had been told it was a .38 that did it, no, I didn't tell them it was—that I had been told. I had mentioned in the statement that it was a .38. After I finished the statement with State's Attorney Cooper, I did not go home, but was taken upstairs to the 11th or 12th floor which they call the Detective Lockup. On the following Monday, I was brought to this building and I was taken into a small room where Mr. Cooper and Fred Montejano were. Mr. Cooper asked me if I wanted to sign the statement and I said no. He didn't offer to read it to me and I didn't actually read it. I told him I was not signing it because they had not kept their promise, and besides it wasn't true. I told them on that occasion that it wasn't true. I did not know other than what this officer told me that is was a .38 caliber gun that killed [fol. 192] Manuel Valtierra. I don't have the slightest idea who killed my brother-in-law. I did not have anything to do with it. I never intended to kill Manuel Valtierra and I never intended to have anything to do with his death. As to the statement that was taken by the State's Attorney where there was some mention of $500, I did not have $500 and did not know any body who had $500. I never offered to give anyone $500 to kill Manuel Valtierra. From the time that Officer Montejano left at about 9:00 o'clock until the time he returned shortly before 12:00, I don't remember how many police officers came in and questioned me; there were so many that came in and out of that room. They kept asking me if I knew anything about the murder and a few of them said they had a witness that said I had shot my brother-in-law in the next room and he was willing to testify that I had done it. I asked them to bring me before this witness as I wanted to see who it was, because I didn't know who it was. I told them I never did anything. I asked them why they were holding my sister Grace and me here. They said because we were here for the murder of my brother-in-law. I didn't say any more to them. I couldn't say just how many times different police officers came in and quizzed me that evening. This was over a period of over three and a half hours.

[fol. 193] Cross-examination.

By Mr. Wesolowski:

The Witness: When I called my sister's home the first time, Judy hung up after I spoke to her. Then the second or third time I called, I told Grace I was coming over for some money and Grace told me she didn't want me to come up. It isn't a fact that she didn't want me to come up because Manuel had warned me to stay away from his house. I never had any arguments with Manuel at all. And he had no arguments with me, and neither one of us had threatened each other with a gun before this time. After I went to this tavern I switched to Gin and Squirt after beer. The gentleman that testified was the bartender that night at Rick's Tavern. After I got to Rick's Tavern, I called my sister's house several times. The first time Oralia answered the phone. At that time I told Oralia to get Grace on the phone, and she said, "Wait a minute". The next time Oralia answered the phone again and I said, "Let me talk to Grace", and she said, "Wait a minute". The last time I called my sister Grace answered the phone. When I got to my sister Hope Huey's house, the cousin that was there was Gin Hing Long, who is my brother-in-law's cousin. My sister Hope lives at 608 West Lawrence and Marine Drive. I told my wife at the drug store that I was going over there to babysit. After I left my wife, I went bowling at Renzino's Bowling Alley and bowled three or four games. DiGerlando did [fol. 194] not bowl any games with me. I am right handed. When I went to surrender at 11th and State, I talked to a desk sergeant, but I do not know his name because I never met the man in my life. I have not seen him since. As to the first time I saw Captain Flynn, the first time I ever knew that he was Captain Flynn was here in court. As to whether I knew him when he was a Lieutenant, I don't even remember him. The first time I saw Mr. Flynn was up on the stand, that was during the preliminary hearing of the motion. When I had the first conversation with Montejano, he left at about 9:00 o'clock. I did not talk to him again between that time. I saw him but not in the same room. We exchanged a few words in Spanish when he was questioning me when I first arrived. He asked me in Spanish if I knew anything about it that it would be better for me to say now.

He told me that he was a friend of one of the brothers of my deceased brother-in-law, that he went to school with one of them. He said if I knew anything he might be able to talk to the family for me. Then he mentioned that if I would tell him, that he would be able to talk to the Valtierra family for me. This ended the Spanish conversation. No one else was around when we were talking Spanish.

Q. By the way, when you saw Mr. Wolfson he made some sort of gesture to you, didn't he?

[fol. 195] A. It was a nod of the head.

Q. Did you at any time previously demonstrate in this court room he held his finger up to his lips?

A. No, I never made a previous motion like that.

Q. Did you ever testify in this court room you understood the motion that he made to mean that you should clam up?

A. I made a statement when during the motion for the suppress the statement, I said it could have meant most anything, if I am not mistaken.

The Witness: I talked to Chan right after I saw Warren Wolfson. I don't know what time that was, there wasn't a clock around. It was around a half hour or forty-five minutes before I was taken in with Mr. Cooper. I don't know the name of the officer who told me I could go home if I made a statement. I did not see him in court at any time. I think I mentioned in my testimony before that Fred Montejano told me in Spanish that my sister and I could go home if I pinned it on Benedict DiGerlando. As to whether when I previously testified, I also stated that Fred Montejano told me that in Spanish, I did. And when I previously testified I also stated that Fred Montejano told me in Spanish why should I take the rap when I am Mexican and he is Italian, why don't I pin it on DiGerlando. I don't recall that conversation taking place. As to who the police officer [fol. 196] was that coached me on what to say when Ted Cooper got there, I don't remember who he was, I never saw him in court. I can't remember what that police officer told me to say. He told me this in the room to the left of the first room as you walk in the door, where I was first seated down when I walked in. He did not tell me anything about telling Ted Cooper that my brother-in-law was always beating my sister. He asked me how they were getting along,

and I said they were getting along good. When I told him that they were getting along good, he said, "Well, you turn it the other way, you say they weren't getting along at all". As to whether or not it was a fact that my sister and brother-in-law did not get along too well, I wouldn't know, I have my own problems. As to whether he told me to say I bought a gun from Benedict DiGerlando, he told me to mention something about a revolver, at that point a .25 automatic. That is the only gun he told me about until the statement was being taken. When the statement was being taken, Ted Cooper walked out of the room and this other detective came in, the same one that told me about that statement told me to say that my brother-in-law was killed with a .38. As to saying anything else about guns at that point, that is all he said. I believe Fred Montejano and the court reporter were in the room when he told me that. The court reporter did not write any of that down. He didn't tell me anything about a .32 at that time, he mentioned that [fol. 197] before when I was sitting down in the room and he was telling me about the statement. That was around 45 minutes to a half hour before I went in to see the State's Attorney. As to whether he took up the whole 45 mintues or half hour coaching me on what to tell the State's Attorney, it didn't too long the way he made it in. I can't remember everything he said. He just says that I purchased a .25 automatic: I was looking to buy a .32 automatic. He told me to say I was going to buy the gun from DiGerlando at a small price. Everything that is in the statement he told me to say. He told me to say that there was a price of $500.00 mentioned and that is why DiGerlando was going to kill my brother-in-law. As to whether he told me anything else to say about him, I don't remember everything he said. As to whether he told me to say anything about going over to my sister's house, I told them I was going over to my sister's house earlier that evening. I went over to my sister's house once that evening and Benedict DiGerlando went over with me at that time. He did not go over there a second time nor did Chan. I don't remember testifying previously that I never talked to the State's Attorney without the court reporter present. I don't remember testifying that everything that was said to the State's Attorney was in the presence of a court reporter. I don't remember if the last

time I testified I said that Fred Montejano was the only [fol. 198] one that promised me anything. I don't remember the last time I testified that I said Fred Montejano told me that my sister and I could go home, and not Chan and I if I blamed it on Benedict. When the officer talked to me about what to tell the State's Attorney, he said something about saying that I was suppose to wait in the car with Robert Chan and DiGerlando was going to the house. As to whether he told me to say anything else about Robert Chan, I don't remember everything he said. The day I was brought to the State's Attorney's office, I was only brought into the little office once on the second floor, I think. I don't remember if I was taken to the second floor of this building first and then to Boys Court. I don't remember going to Boys Court. As to whether I remember going before Mr. Cooper at that time, I was brought in the room by Fred Montejano. This was in the early morning hours, eight or nine. I don't think it was later than nine, but I don't recall the time. It could have been later than nine, but I wouldn't know if it was later than ten. I don't know the latest it possibly could have been. When I went before Mr. Cooper, I didn't state that I refused to sign the statement on the grounds that it might incriminate me under the 5th Amendment. I don't know if anyone else said that. My lawyer didn't tell me in Boys Court before I came to Mr. Cooper's Office to refuse to sign the statement because it was my right under the 5th Amendment.

[fol. 199-200] The officer that told me what to say didn't tell me anything about the car.

(Witness excused)

* * * * * * *

[fol. 201] FRED MONTEJANO, called as a witness on behalf of the State in rebuttal, having been previously sworn, was examined and testified as follows:

Direct examination.

By Mr. Wesolowski:

The Witness: I am the Fred Montejano who testified earlier and at no time on January 30th or January 31st 1960 did I speak Spanish with Daniel Escobedo. I did not at any time tell him that I knew his family or the Valtierra family and that I could help him out. I did not at any time make any promises of leniency or reward to Danny Escobedo, and I did not or no one in my presence at any time struck or hit Robert Chan. I did not and no one in my presence ever told Robert Chan to tell Daniel Escobedo that he was beaten or hit and tell him that he better tell everything. As to the names of all the officers who were present in the Homicide Bureau on January 30th of 1960, there was my partner—Gerald Sullivan, Detective Thomas O'Malley, Detective Thomas Talty and Deputy Chief of Detectives. There might have been other police officers that came in up to and including the time Mr. Cooper arrived and took a statement from him. I was busy interrogating other defendants. I believe Detective Rowan was on his day off. On February 1st, 1960, I had occasion to transport or cause to have transported Daniel Escobedo to the State's Attorney's Office at 2600 South California, [fol. 202] between 9:00 to 9:30 A.M. I took Danel Escobedo to the second floor, to one of the offices where I met Assistant State's Attorney Cooper. Mr. Cooper had a statement that was given on January 30th in the offices of the Homicide Section. The defendant was asked if he would sign it. This was about 10:30 or 11:00 o'clock. I did not remain from the first time I arrived. On the first time I arrived, we went to the second floor and spoke to Assistant State's Attorney Frank Ferlic. Then we returned to the Boys Court. When I say "we", I mean Daniel Escobedo, Robert Chan, Grace Valtierra and Benedict DiGerlando. My two partners, Walter Rowan and Gerald Sullivan were present. We remained in Boys Court

for about an hour or two, I don't recall exactly the time. Then we returned to the Criminal Court Building. Daniel Escobedo and myself and the rest of the defendants met Mr. Cooper. Daniel Escobedo refused to sign the statement which he had previously given on January 30th 1960. In the presence of Mr. Cooper and I, Daniel Escobedo did not ever say, "I'll not sign it. The promises that were made to me were not kept and that statement is not true". He said, "I won't sign it, I take the 5th Amendment" or something to that effect.

Cross-examination.

By Mr. Schiller:

The Witness: I don't recall whether the statement was in [fol. 203] fact read to him. I testified that I didn't see Danny Escobedo from 9:00 o'clock until ten minutes to 12:00 on the night that the statement was taken from him. I might have left him at 9:00 o'clock but I no doubt saw him. As to whether my answer in this court room under oath two days ago was that I didn't see him until 9:00 o'oclock, until the statement was to be taken at 10 minutes to 12:00, I would like to have the court reporter refresh my memory. I don't recall my testimony was that. I might have seen him between 9:00 o'clock and ten minutes to 12:00, but I don't recall. I recall my testimony but I don't recall if I testified that I did not see him from 9:00 o'clock until ten minutes to twelve for almost three hours after I said that Captain Flynn took him from me at 9:00 o'clock. As to how many officers are assigned to the Homicide District, we generally have anywhere from 4 to 6 cars, with two men to a car. So that would be from eight to twelve officers. The officers usually report for work a quarter to four and they usually get their assignment and leave the office about 4:30. As to whether they return, it all depends on the type of work they are doing. It is hard to tell. Usually they will call in. If there is anything pending they are asked to come into the office or call the office. They are given squad cars from the Police Department. Normally we return the police cars anywhere from 11:30 [fol. 204] to 12:00 p.m. Ordinarily, they do return. As to whether I know the relatives of Valtierra, I grew up in the neighborhood, and I do know them. I never told Danny

Escobedo in my lifetime that I knew the Valtierra family. As to whether I think he guessed that I knew them, there was no need for me to tell him that I knew the family as that didn't concern him at all. It concerned me. I might have seen other officers and there may have been others around. I saw Officer Sullivan, O'Malley, Talty and Captain Flynn. Others I don't recall. We normally do have a man that they permanently assign to answer the phone calls at Homicide at night, but this was a Saturday night and that was his day off. I don't recall who took his place to answer the phone. There must have been someone to answer the phone, you are right. This officer had to be another officer other than Officer Sullivan, O'Malley, Talty and Flynn. I arrived about 7:30 or a quarter to 8:00 with Benedict DiGerlando. As to whether I didn't see Danny until after he had been there sometime, I was not one of the arresting officers. As to the names of the officers who brought Danny in, to my recollection, it was my partner Gerald Sullivan. As to who the other two were, I don't recall. I don't recall whether the other two officers were Captain Flynn, Officers Talty, O'Malley or Sullivan, or whether they were two other officers. The new shift of officers comes into Homicide for the next shift at about a quarter to 12:00. I don't have [fol. 205] any idea what time. Normally I would come in 15 minutes early, that is what I would do. There certainly must have been other officers that came into Homicide to report for the midnight shift. I don't recall, I was in the room with Danny Escobedo around that time. I got to the room with Danny Escobedo at about ten minutes to 12:00. It is a possibility the officers from that other shift were coming in and some of them had arrived already at that time. I don't recall who these officers were. I couldn't answer as to how many there were. I can't answer whether any of those officers that came in for the following shift talked to Danny Escobedo before I began being present at his questioning at ten minutes to 12:00. As to the number of officers there on that shift that starts at 12:00 o'clock, usually we have two cars, that is four men. We would also have a secretary and another man would be in the office. The Homicide Department of the Detective Bureau is on the 3rd Floor of the Police Department building. Directly next to the Homicide Section is the

Burglary Section. There is a door there but it is sealed off and no one can enter. I have no knowledge of whether there were burglary detail officers right next to the Homicide Section. Those are complete separate offices and we never see them and they usually never see us. Captain Flynn is not in the Homicide Section, he is the Deputy Chief of Detectives. He did come in though. He was in [fol. 206] still another office on that floor, he works the office to the extreme north end of the hall. He has a secretary who is also a police officer but I do not know his name. I did not see the other officer that works with the Deputy Chief that night. I don't recall the time but I was in the presence of Detective O'Malley, Daniel Escobedo and DiGerlando. As to whether that was about 9:00 o'clock, I don't recall the exact hour. I heard Officer O'Malley testify. I heard Officer O'Malley say that it was about 10:30 that he and I took Danny Escobedo and confronted Benedict DiGerlando with him. As to whether or not it was true, I don't recall, but if you want me to say otherwise, I will.

Q. Isn't it a fact, Officer Montejano, that when you testified here the other day under oath didn't you say that you never confronted Danny Escobedo with Benedict DiGerlando, they were never confronted in your presence because when you were going to do that your superior officer took Danny Escobedo away from you and you never saw him again until ten minutes to 12:00? Wasn't that your sworn testimony under oath in this court room?

A. You asked me if I ever confronted—O'Malley did the confronting, I was just assisting him.

Q. Wasn't it your testimony that you weren't there when that happened?

A. Not to my recollection, sir.

[fol. 207] Redirect examination.

By Mr. Wesolowski:

I didn't hear what O'Malley said to DiGerlando and Escobedo. He questioned them and that's all I can remember about that. I know some members of the Escobedo

family. The door I talked about that is sealed off between Burglary Detail and the Homicide Detail is in the captain's office. That is the room where the statement was taken.

(Witness excused)

THOMAS O'MALLEY, called as a witness on behalf of the State in rebuttal, having been previously sworn, was examined and testified as follows:

Direct examination..

By Mr. Wesolowski:

The Witness: My name is Thomas O'Malley and I am the same Thomas O'Malley that testified earlier. I didn't arrest Danny Escobedo and I wasn't present when he was arrested, I was in the Homicide Office when he came in, I didn't arrest Robert Chan on that date but I saw him in the Homicide Office on that date. No one in my presence struck at Robert Chan nor did I. Neither I nor anyone in my presence ever told the defendant that he could go home if he made a statement, and neither I nor anyone in my presence told defendant that if he made a statement blaming Benedict DiGerlando for the shooting that he could go home that night.

[fol. 208] Cross-examination.

By Mr. Schiller:

As to how many police officers were on that particular shift I was on, I wouldn't know exactly, but it was anywhere from 9 to 12, active, out on the street. I remained in the Homicide Section when these other officers went out. There was also an office man in there but I don't recall who it was on that date. The Chief of the Homicide and his assistant were not there. All I can recall is myself and the Secretary for the Homicide Department and another officer being there that evening. And then the other officers came in. I am not sure who went out and picked up Danny Escobedo. I believe two officers picked him up. They brought Danny and his sister in together. There could have been

three. As to the other officers on my shift, Officer Talty and I were actually beyond our tour of duty. We were not on the evening watch but on the day watch. I couldn't say who the other officers were on that particular tour of duty because I am not assigned to that watch. I know most of the officers at Homicide and I saw these officers bring in Danny Escobedo and his sister. I didn't see them coming in with them, no. Benedict DiGerlando was brought in too; I was one of the officers and the others were Gerald Sullivan, Fred Montejano and Tom Talty. We had two cars there that night. Robert Chan was picked up afterwards, if I recall right, by Fred Montejano and Officer Talty. I don't know [fol. 209] who the other officers were on the shift. I don't know who the officers were who came in for the following shift. I left Homicide around 2:00 o'clock that night. I was in the Homicide Office when the officers came in for the following shift but we have several officers there. I saw some of them come in but I don't know who they were. There are four rooms in the Homicide Section. Daniel Escobedo was in the room off of the room where I was seated and Robert Chan. I don't know if they were brought in together. As to whether they were brought into the same room at one time, they were in that room. I don't know how they got in there, or who brought them in there. Grace Valtierra was in another room and in the other room was Benedict DiGerlando.

Redirect examination.

By Mr. Wesolowski:

Robert Chan and Danny Escobedo were approximately from 10 to 12 feet apaft.

(Witness excused)

GERALD T. SULLIVAN, called as a witness on behalf of the State in rebuttal, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wesolowski:

I am Gerald T. Sullivan and I am a Detective of the City of Chicago assigned to the Homicide Unit and was so assigned on January 30, 1960. I arrested Danny and brought him into the Detective Bureau where I stayed about two [fol. 210] or three or four hours afterwards, and then I went home. I left about 1:00 o'clock in the morning. From the time I first arrested Danny until the time I went home, neither I nor anyone in my presence made any promises of leniency to Danny nor did we make a statement that he could go home that night if he made a statement, nor did I or anyone in my presence tell Daniel that if he made a statement blaming the shooting on Benedict DiGerlando that he could go home that night. Neither I nor anyone in my presence struck Robert Chan. Robert Chan did not in a conversation in my presence tell Danny Escobedo that he was beaten or struck and that the police would do it again unless they blamed Benedict DiGerlando.

Cross-examination.

By Mr. Schiller:

The Witness: Detective John Loftus and Frank Lesandrella were with me when I arrested Danny Escobedo. They are attached to the Homicide Section. They accompanied Danny to the Homicide Section. I don't think they remained there that night too but left shortly after they took him into the Detective Bureau. I have no idea when they returned. I can't recall whether I saw them later that day. They were part of the watch that I was on. As to who else was in the Homicide Section when we brought Danny in, I believe Officer O'Malley and our Desk man who I think was Roy Medari. I have no idea who the others would be. There may have [fol. 211] been other men from our Unit working in the four offices. All offices were not occupied that evening by

the different defendants. Grace Valtierra was in one office, DiGerlando was in another, and I believe Robert Chan and Escobedo were in the same office. I know Officer Lopez and I don't think he was on my watch. I don't believe he was there that night. I know Officer Brackenberry and I don't recall his being there that night. I know Officer Schultz and he is in my Homicide Section but I don't believe he was there that night. I know Officer Rowan and he was off that night. I don't believe Sergeant Clark was there. As to what officers I saw there throughout the night, they were Officer Talty, Montejano, O'Malley, Loftus and Lesandrella. There may have been more officers in the change of shift but I don't recall who they were. There were other officers that came in about 11:30 or a quarter to 12:00, there was a change of shifts. On the way in from the home to the Detective Bureau, I related to Escobedo what DiGerlando had told us that Danny Escobedo did the shooting and that DiGerlando drove the car. Danny said, "I'll have to hear him say that to my face. Officer Lesandrella and Officer Loftus were also present. I told my conversation here in court. When I came back to the Detective Bureau that night, I did not talk to Danny again about that because he was confronted with DiGerlando. I got to the Detective Bureau around 9:30 or 9:45. Officer Montejano was not there when I got there. I know where he was but he wasn't at the De-
[fol. 212] tective Bureau. He came in shortly after I did, after 9:30. I did not take Danny Escobedo and confront him with DiGerlando. I know he was confronted with DiGerlando but I wasn't there. I remember seeing the Chief of Detectives that night around 10:15 to 10:30. Officer Montejano was with the Chief of Detectives. I don't know whether I saw Officer Montejano and Danny Escobedo together at about 10:15 to 10:30. They might have been together earlier or later but they were together. I saw them talking, yes, sir. I don't recall whether I talked to Danny again that night or not. I believe I did, I think I talked to him. I think Chief Flynn was present during this conversation. I was there for a few minutes and I heard Danny say, "I didn't do it. DiGerlando did the shooting. I drove the car." This was when he was with Chief Flynn about a quarter to 11:00 or 11:00 o'clock. I think Officer O'Malley was there. I didn't hear Officer O'Malley question Danny

Escobedo because I was only there a few minutes and I left. I didn't question him. I don't recall Officer Montejano questioning him. I don't know whether Officer O'Malley questioned him. I don't remember if I was there when Officer Talty was there. I saw him in the office but I wasn't there when he questioned anybody. I wasn't there when Assistant State's Attorney talked to Danny Escobedo. I was in the office but I wasn't present when he questioned him. I saw [fol. 213] Danny sitting there many times when I was in and out of the office. The other officers, O'Malley and Montejano were talking to Escobedo.

(Witness excused)

WALTER ROWAN, called to the stand as a witness on behalf of the State in rebuttal, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Wesolowski:

The Witness: I am Walter Rowan, a Police Officer of the City of Chicago with the rank of Detective, assigned to Homicide Detail where I was so assigned on January 30, 1960. I did not work that day. I worked the first day of February, 1960. On that occasion, I saw Danny Escobedo and brought him to 26th Street and California where we arrived between 9:30 and 10:00 o'clock at the State's Attorney's office on the 2nd floor. We stayed there approximately 15 minutes. When I say we, I mean my partner, Fred Montejano, Gerald Sullivan, Danny Escobedo, Benedict DiGerlando, and Robert Chan.

Q. And at that time did Ted Cooper present Danny Escobedo with a document or a statement?

A. Yes, sir, he did.

Q. And what, if anything, did he say to Daniel Escobedo at that time and what, if anything, did Daniel Escobedo say to Mr. Cooper?

A. Mr. Cooper showed Daniel Escobedo the statement [fols. 214-222] which he had made and asked if he would sign it after he read it to him and he handed the statement

to Danny Escobedo and Danny didn't want to sign it on the advice of counsel.

Cross-examination.

By Mr. Schiller:

Q. Now, he had been taken in custody Saturday, is that right?

A. According to the records, yes, sir.

Q. And this was now on Monday?

A. Yes, sir.

Q. And was it that morning, was that the first time he was taken to Court?

A. Yes, sir.

Q. He had been in custody now for two days and hadn't been brought to court, is that right?

A. Yes, sir.

(Witness excused)

• • • • • •

VERDICT

[fol. 223] The Clerk: (Reading) "We, the jury, find the defendant, Danny Escobedo, guilty of murder in manner and form as charged in the indictment, and we fix his punishment at imprisonment in the State Penitentiary for the term of 20 years. And we further find from the evidence that the said defendant, Danny Escobedo, is now about the age of 22 years."

Motion for New Trial.

ARGUMENT ON THE MOTION FOR A NEW TRIAL

Mr. Novit: Your Honor, on motion of the defendant, we are making a motion for new trial on the basis, first, that the total evidence as set down by the People of the State of Illinois was insufficient to support a finding of guilty in this case. I'd like to review some of the evidence that the State admitted for your consideration. As you remember, your Honor, the State presented a document purporting to be a confession of the defendant, they presented a life and

death witness, they presented policemen that were involved in the taking of the so-called confession and they presented one other witness, who, rather than furthering the State's case, went on to cast a reasonable doubt, which would be [fol. 224] to the benefit of the defendant. This was a bartender who placed the defendant approximately six miles away just minutes before the happening of the crime. Now, this one witness, taken in conjunction with the defendant witness—as you remember, your Honor, a telephone call was involved. The tavern keeper witnessed the telephone call and this telephone call was made minutes before the crime took place, and it was approximately six miles away. The defense witness came on after this and also discussed this telephone call. There was a motion to exclude, so this defense witness had no idea that a telephone call was discussed. He placed the time of this telephone call at approximately ten or fifteen minutes after twelve, which was the time of the murder. Again I'd like to point out this thing is a six-mile difference in location. Now, what evidence did the State show? None whatsoever, your Honor. The only thing they showed was a confession. Now, this confession was repudiated by the defendant. This confession was in question from the beginning of the trial. And it is my contention at this time that this was at least a reasonable doubt cast upon the guilt of the defendant. Now, we are further alleging that the document purporting to be a confession should never have been admitted into evidence, and that it was error of this Court to allow this document to be admitted into evidence. I'd like to call your attention to the pre-trial hearings that we had in this case, my motion [fol. 225] to suppress. This motion to suppress was taken in conjunction with Attorney Bellows' motion to suppress on a case which was related to this case, the Chan case. Now, after all the evidence was heard on the motion to suppress, a stipulation was entered into between the State's Attorney and myself where the evidence used in the Chan case would be used also in the Escobedo case. Now, after the hearing of this evidence, this Court sustained the motion to suppress the confession in the Chan case and failed to sustain the motion in the Escobedo case. Since the evidence, for the most part, was identical, and since there was no material difference whatsoever in the evidence admitted

in the Escobedo case, I state that it was error of this Court to allow one confession to be suppressed and one confession to be admitted. Now, your Honor, my third allegation in the motion for new trial is that the Court committed error, after allowing this confession to go into evidence, the Court committed error by allowing this confession to be taken back into the jury room. Now, an objection was made at the time, and the defense asked the Court not to permit this confession to go back into the jury room. Now, we must realize that the document purporting to be a confession was in no way, was in no way prepared by the defendant. The defendant initialed no part of this document, the defendant did not sign this document. This document was [fol. 226] prepared entirely by the State and by employees of the State. And I say it was error for this document to be admitted in the jury room. I think it was prejudicial and inflammatory, and I believe it had a great deal to do with the handing down of the verdict. Now, my fourth allegation in this motion for a new trial, your Honor, is that the closing argument of the State's Attorney was inflammatory and prejudicial to the rights of the defendant. In one instance, the State's Attorney in his closing argument made reference to the fact that the defense did not subpoena in a police officer who was present. He made this in sort of a snide, whispering aside to the jury, saying, "The police officer is here. If the defense thought that this police officer was helpful to their case, why didn't they subpoena him in?" And then he smiled at the jury. Now, it is a basic right that it is not the duty of the defendant to make any move to defend himself. He is not obligated to subpoena witnesses on his behalf. He does not even have to take the stand on his behalf. And I say that any reference to an action that the defendant did not take was inflammatory, was prejudicial and was a violation of the constitutional rights of the defendant. For these reasons, your Honor, I ask that this Court grant a new trial in this case.

Mr. Mackoff: May I respond, judge?

The Court: Yes.

Mr. Mackoff: Regarding the sufficiency or weight of the [fol. 227] evidence in this case, the jury has passed upon that. Mr. Novit comments upon the fact that the confession, which was part of the State's case, was denied by the de-

fendant. And I am sure that is true, that he denied it, but, on the other hand, the jurors, as triers of the facts, determine who they believe and who they don't believe. In this case they didn't believe the defendant, and their verdict shows it. Regarding the admission of the confession into evidence in the first place, the Court had heard the evidence as to Escobedo. Whatever the evidence was as to Chan has no bearing on this particular motion for new trial. However, in commenting on it I will say to the Court, if the Court recalls, that there were material differences in the considerations as to Escobedo and as to Chan, and the Court so ruled in his decision. And in setting out the differences—as a matter of fact, the Court went into great detail to set out the differences between Chan and Escobedo in ruling one confession in and disallowing the admission of the other confession. Regarding the point about the calling of the police officer, while the State is not allowed to comment on the fact that the defendant did not take the stand, if he did not take the stand, it is a different situation in regard to the calling of witnesses. The State may comment on the fact that the defense did not call any witnesses in their behalf. It is quite a different story than allowing [fol. 228] that the State comment on the defendant's not taking the stand because there is the constitutional guarantee against self-incrimination. The testimony of others does not fall within that constitutional guarantee. I say to the Court that the jury heard all of the evidence that was presented to them, and all of the evidence that was presented to them was legal and competent evidence, and based on that evidence they rendered their verdict of guilty against this defendant. Also, your Honor, for just a moment, I failed to reply to Mr. Novit's statement about the confession going in to the jury room. In that area, it's an area in which the Court has a great deal of discretion in allowing exhibits into the jury room. Here in this situation the exhibit was in evidence and the Court has the discretion to allow any exhibit which is in evidence into the jury room. In this case the Court allowed the confession in, which was in evidence. It was not error. The trial was conducted fairly. The jury's verdict was a fair one on the basis of all the evidence presented to it.

Mr. Novit: May I say one or two things in reply, your Honor?

The Court: Yes.

Mr. Novit: First of all, the State's Attorney stated here that this case had nothing to do with the Chan case. This case had a great deal to do with the Chan case in that we [fol. 229] stipulated to certain evidence that was presented in conjunction with the Chan case in this case. Secondly, the State's Attorney said that there is no constitutional provision which protects a defendant against the State making allusion to him not calling certain witnesses. The most basic constitutional conception is present in this case, your Honor, and that's the conception that a man is not guilty unless he is proven so beyond a reasonable doubt, and that it is the State's duty to prove him guilty. They cannot prove him guilty or make allusion to his guilt by telling what he did not do. They can only say what he did do and they can say nothing about his failure to call a witness. And this is in violation of the constitution.

Mr. Mackoff: Judge, the jury was instructed as to the burden of proof in the case.

Denial of Motion for New Trial

The Court: Yes. The Court remembers this case very vividly. Concerning the confession, I think defense counsel's contention that the evidence as to Chan and Escobedo was the same isn't so. There was a great difference. From the testimony as to Escobedo on the hearing, in spite of the fact that a lawyer was present and told him not to talk, hinted to him, told him to keep his mouth shut, he voluntarily made the statement. In the Chan case, Chan asked for a lawyer. He said he wasn't going to say anything without his lawyer. There was a difference there, and I think [fol. 230] that's why the Court distinguished between the two statements. At this time the Court will deny the motion for a new trial. Denied.

Mr. Mackoff: Is there a motion in arrest of judgment?

Mr. Novit: Yes, there is a motion in arrest of judgment.

The Court: There is a motion in arrest of judgment.

Mr. Novit: Yes.

The Court: The motion is overruled.

Mr. Mackoff: Judge, will there be a judgment on the verdict?

The Court: Judgment on the verdict.

Mr. Mackoff: And will the defendant now be sentenced to the Illinois State Penitentiary for a term of twenty years?

The Court: The sentence is twenty years in the Illinois State Penitentiary. All right.

Mr. Novit: Your Honor, will the time that the defendant has already been in custody be considered as served by this Court? He has been in custody now for a year.

Mr. Mackoff: The sentence was the sentence of the jury, not the Court.

The Court: Does the Court have that authority?

Mr. Novit: I'm sure you have, your Honor. I mean t was on three continuances by this Court that this was held up.

[fol. 231] Mr. Mackoff: Counsel is talking about the time prior to trial. The Court has no authority in that respect, judge.

The Court: That motion will be denied. All right.

(Which were all of the proceedings had in the above entitled cause.)

* * * * * * *

[fol. 232] IN THE SUPREME COURT OF ILLINOIS

Docket No. 36707—Agenda 15—September, 1962

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,

v.

DANNY ESCOBEDO, Plaintiff in Error.

OPINION—February 1, 1963

MR. JUSTICE KLINGBIEL delivered the opinion of the court:

After trial by jury in the criminal court of Cook County the plaintiff in error was found guilty of murder and was sentenced to imprisonment for 20 years. He assigns as

error the court's refusal to suppress a confession made while in police custody. He also contends that the evidence is insufficient to sustain the verdict and that the closing argument of the State's Attorney was improper and prejudical.

The record shows that about midnight on January 19, 1960, Manuel Valtierra was found lying in the back yard of his home. He had been shot and he died shortly after midnight, apparently without divulging the name of his assailant. About 2 o'clock in the morning the plaintiff in error, a brother of the decedent's wife, was taken into custody together with a companion. At 5 P.M. on that day they were released after their attorney had obtained a writ of *habeas corpus*, but they were again arrested on the evening of January 30 around 8 o'clock.

Upon arrival at the station plaintiff in error requested permission to see his lawyer but was told that the lawyer did not want to see him. At 10:30 the attorney came to the station asking to see his client. The officer on duty refused to allow it. The attorney proceeded to the homicide bureau, where plaintiff in error was being questioned, but was prevented from entering. Although he identified himself, named the person he was representing, and called attention to the right of consultation, the officers persisted in their refusal. They told him he could not see his client because they were not through with him. All the attorney managed to do was catch a glimpse of plaintiff in error, and he finally left the detective bureau about 1:00 A.M. without being permitted to interview or advise him. Some time between 11:15 and midnight plaintiff in error made a statement in which he related his negotiations for the purchase of a gun, the making of an arrangement with one of his confederates who actually did the shooting, and his waiting in an automobile while the other two waylaid and shot his brother-in-law as the latter arrived home from work.

Plaintiff in error testified, at the hearing on the motion [fol. 233] to suppress, that he was told his confederate had accused him of doing the shooting. The police further informed him there was a pretty tight case against him but if he would make a statement he could go home that night and would merely be a witness against the confederate. He was brought in to confront the confederate, who then accused

him of having shot his brother-in-law. He was not permitted to speak in that room but gave his statement later in the State's Attorney's office.

Plaintiff in error further testified that he was handcuffed all the time, except when he was brought to confront his confederate and when he was brought in before the State's Attorney, that he heard a detective telling the attorney the latter would not be allowed to talk to plaintiff in error "until they were done", and that he heard the attorney being refused permission to remain where he was.

The testimony of the police officers supported defendant's claim that he had been denied the right to talk to his attorney. However, the officers denied that they had promised immunity or leniency if the defendant confessed.

The principal question on this writ of error is whether the court properly refused to suppress or exclude the statement, and this depends in turn upon whether the statement was made freely, voluntarily and without inducement. (*People* v. *Price*, 24 Ill.2d 46.) If the defendant's will was overborne by physical or mental pressure, or if his confession was given as a result of a promise of leniency or immunity, it is not considered voluntary and must be suppressed as evidence. (*People* v. *Miller*, 13 Ill.2d 84.) Its admissibility is a preliminary question which must be decided by the trial court from evidence heard outside the presence of the jury, and at such a hearing, where defendant contends the confession was involuntary in this sense, the burden is on the State to prove by a preponderance of the evidence that it was properly obtained. *People* v. *Sammons*, 17 Ill.2d 316.

In the present case it is undisputed that defendant's attorney was refused permission to see him. While such conduct by officers having custody of an accused does not in itself render a confession incompetent, it is a circumstance to be considered in determining whether the State has satisfied its burden. (*People* v. *Nemke*, 23 Ill.2d 591; *People* v. *LaFrana*, 4 Ill.2d 261; Ill. Rev. Stat. 1959, chap. 38, pars. 477, 730.) Where such is the case the State must show all the circumstances surrounding the making of the statement. [fol. 234] According to defendant's testimony, he was given to understand that his confederate was the one who was wanted and that if he gave a statement he would be re-

quired to serve only as a witness. He also would naturally infer, from the remarks made to his attorney, that if he gave the statement he could then confer with the attorney. In spite of the fact that the officers denied making any promises of leniency, it seems manifest to us, from the undisputed evidence and the circumstances surrounding defendant at the time of his statement and shortly prior thereto, that the defendant understood he would be permitted to go home if he gave the statement and would be granted an immunity from prosecution. As we pointed out in *People* v. *Price*, 24 Ill.2d 46, 58, where a somewhat similar situation was presented, the potency of such a ruse on a frightened and inexperienced person certainly affects the voluntary character of his confession. In our opinion the State failed to meet the burden of proving the voluntary nature of defendant's statement, and the court erred in ruling that it was admissible.

In view of our conclusion we need not consider the other contentions advanced by defendant. For the error indicated, the judgment of the criminal court of Cook County is reversed and the cause is remanded for a new trial.

Reversed and remanded.

Mr. Justice House dissenting:

[fol. 235] In the Supreme Court of Illinois

May Term, A.D. 1962

Petition for Rehearing—Filed Feb. 21, 1963

The People of the State of Illinois request a rehearing in this cause for the reason that the court's opinion is based entirely upon disputed evidence and ignores completely certain controlling and undisputed evidence.

The opinion states:

> "About 2 o'clock in the morning the plaintiff in error, a brother of the decedent's wife, was taken into custody together with a companion. At 5 P. M. on that day they were released after their attorney had ob-

tained a writ of *habeas corpus*, but they were again arrested on the evening of January 30 around 8 o'clock." (Opinion, p. 1).

[fol. 236] This recitation of the facts ignores entirely the testimony of defendant that between his arrest on January 19, 1960 and his arrest on January 30, he sought and obtained the advice of his attorney who told him not to give a statement if he should be subsequently arrested. (Abst. 42.) Since the opinion takes into account the denial of counsel at the police station, this evidence is important.

The opinion then states:

"All the attorney managed to do was catch a glimpse of plaintiff in error, and he finally left the detective bureau about 1:00 A. M. without being permitted to interview or advise him." (Opinion, p. 1.)

This recitation of the facts ignores entirely the testimony of defendant that he saw his attorney in the police station:

"Q. And after that you did see your attorney?
A. After an hour or so.
Q. You saw your attorney?
A. Yes.
Q. And he made a motion to you?
A. Yes, he did.
Q. And that motion indicated to you, first of all, *that you shouldn't say anything*, and second of all, he wanted to talk to you?
A. *That's right.*" (Abst. 54-55.) (Emphasis added.)

The opinion then states that the defendant was "a frightened and inexperienced person." (Opinion, p. 3.) Nowhere in the record is there any such evidence. The defendant did not so testify and neither did anybody else.

The heart of the opinion reasons that the confession was involuntary because:

[fol. 237] "It seems manifest to us, from the undisputed evidence and the circumstances surrounding defendant at the time of his statement and shortly prior thereto, that the defendant understood he would be per-

mitted to go home if he gave the statement and would be granted an immunity from prosecution." (Opinion, p. 3.)

With all respect for the court, there simply is no such "undisputed evidence and * * * circumstances surrounding the defendant" to be found anywhere in the record. The defendant testified that the *only* promises of leniency or immunity or that he could go home and be only a witness were made by Detective Montejano:

"Q. Now, Mr. Witness, at the time you were told that if you implicated DiGerlando that you would be only a witness and that you would be allowed to go home after that, who told you that?

A. Montejano.

Q. And when did he tell you that?

A. That was after he questioned me, in the other room.

Q. And who else was there at the time?

A. Robert Chan was on the side.

Q. And who else was there?

A. Just I, Montejano and Robert Chan [a co-defendant].

Q. Were there any other police officers?

A. No, there were no police officers there.

Q. And at that time did he say that to you in English or Spanish?

A. He told me that in English.

Q. In what?

A. In English.

[fol. 238] Q. And did he tell you what you would have to do aside from making the statement?

A. All he said is that I would just have to make the statement and that would be it." (Abst. 47-48.)

But Detective Montejano testified:

"From the time that I saw Daniel Escobedo up to the time that he had completed making his statement to Assistant State's Attorney Cooper, I did not or any one in my presence beat, strike, hit, or threaten him *or make any promises of leniency or reward or*

leniency of prosecution if he made a statement." (Abst. 24.) (Emphasis added.)

. . . . . .

"I never made any statement when I first talked to the defendant that he would only be used as a witness if he pointed his finger at Benny. I did not tell him that he would be able to go home that night. I did not tell him, 'You and your sister can go home right now if you put your finger on Benny'." (Abst. 28.)

There is therefore an allegation of promises and a complete denial. Yet the court finds from the "undisputed evidence" that promises were made. What the court is saying, without ever having seen any of the witnesses, is that Escobedo was telling the truth and that Detective Montejano is a perjurer: ***And the irony of it is, that even the defendant recognized what the court does not, that there is no undisputed evidence of promises, for not once in the Brief and Argument was it ever contended by defendant that his confession was obtained by promises. The point upon which the court reverses the conviction was not even raised by defendant in this court. He relied solely upon the denial of counsel!***

[fol. 239] Of course the rule is, as the court says, that "the burden is on the State to prove by a preponderance of the evidence that it [the Confession] was properly obtained." (Opinion, p. 2.) That rule was not ignored, but applied, by the trial judge. The concurrent rule is that a decision of the trial court upon the question of the voluntariness of a confession cannot be set aside upon appeal unless it is shown that it was "manifestly against the weight of the evidence." (*People* v. *Weger*, 25 Ill. 2d 370, 374.) It cannot possibly be said that the trial judge's ruling in this case was "manifestly against the weight of the evidence." Such evidence simply does not exist.

We look beyond the decision in this case. If the court is willing to re-examine diametrically opposed evidence here and decide from the cold record that one witness told the truth and one lied, it must recognize that it will be asked to do so in every subsequent case, and fundamental fairness would dictate that every defendant hereafter be

given the same consideration as the court's opinion now gives to Danny Escobedo.

We believe this court was probably affronted by the denial of counsel to Escobedo at the police station in violation of the statute. That conduct of course is to be deplored. But as long as the rule of the Supreme Court of the United States and of this court is that this action alone will not void a confession (and without such a rule there will be no more confessions), then it works an injustice to the People to the State of Illinois to reverse a conviction upon a ground not supported in the least by the evidence and not even raised by defendant at any time during this [fol. 240] appeal in an unspoken reprisal against the police for such an affront.

Respectfully submitted, William G. Clark, Attorney General, State of Illinois, Supreme Court Building, Springfield, Illinois, Attorney for Defendant in Error.

Daniel P. Ward, State's Attorney, Cook County, Criminal Court Building, Chicago 8, Illinois; Fred G. Leach, E. Michael O'Brien, Assistant Attorney Generals; Edward J. Hladis, James R. Thompson, Assistant State's Attorneys, Of Counsel.

[fol. 241] IN THE SUPREME COURT OF ILLINOIS

May Term, A. D. 1962.

[Title omitted].

ANSWER TO PETITION FOR REHEARING—Filed April 11, 1963

Plaintiff in error respectfully submits that the decision of this Court, announced February 1, 1963, reversing his conviction, was correct and should not be overturned on rehearing. Plaintiff in error respectfully submits that his pre-trial statement, having been obtained in violation of the commands of the Fourteenth Amendment to the Constitution of the United States, as well

as in violation of Article II of the Constitution of the State of Illlinos, was improperly allowed into evidence and should have been suppressed prior to trial.

Upon the initial presentation to this Court, plaintiff in error asserted five grounds for reversal. All of these arguments are still valid and each set forth a ground for reversal. In its opinion reversing the conviction, this Court decided that the pre-trial statement was erroneously ruled admissible below. This ultimate holding was correct and should be adhered to not only for the reason announced therein, *i.e.*, that the totality of cir-[fol. 242] cumstances rendered the statement inadmissible, but also for the further reason that the fact that the statement was obtained from the accused during a period of interrogation and confinement after the accused and his counsel had been denied the right of consultation *ipso facto* renders the statement inadmissible under the Fourteenth Amendment to the Constitution of the United States.

1. The Totality of Circumstances Discloses that the Pre-Trial Statement was not Voluntarily Given by the Accused.

In the Petition for Rehearing, the People charge this Court with ignoring certain evidence and with basing its decision upon matters purportedly not even raised by the accused. On the contrary, the decision of this Court was based upon matters of record and the logical inferences flowing therefrom, as argued by the accused to this Court.

The basic facts of this case are not in dispute.

> "Upon arrival at the station plaintiff in error requested permission to see his lawyer but was told that the lawyer did not want to see him. At 10:30 the attorney came to the station asking to see his client. The officer on duty refused to allow it. The attorney proceeded to the Homicide Bureau, where plaintiff in error was being questioned, but was prevented from entering. Although he identified himself, named the person he was representing, and called attention to the right of consultation, the officers persisted in their refusal. They told him he

could not see his client because they were not through with him. All the attorney managed to do was catch a glimpse of plaintiff in error and he finally left the Detective Bureau about 1:00 a.m. without being permitted to interview or advise him." (Opinion, page 1).

[fol. 243] "The testimony of the police officers supported defendant's claim that he had been denied the right to talk to his attorney. * * * In the present case it is undisputed that defendant's attorney was refused permission to see him." (Opinion, page 2).

The above extracts from this Court's Opinion succinctly set forth the underlying facts of the case. These are the facts which this Court termed "the undisputed evidence" in this case[1] (Opinion, page 3).

The other principal factor, though by no means the only other one present, is the controverted "promised immunity or leniency". In its opinion, the Court recognized that such testimony was in conflict.

The defendant testified, as related in the Court's opinion, that the police told him that "there was a pretty tight case against him but if he would make a statement he could go home that night and would be merely a witness against the confederate." (Opinion, page 2.)

This Court then observed, "However, the officers denied that they had promised immunity or leniency if the defendant confessed." (Opinion, page 2.)

The People, in their Petition, assert that "not once in the Brief and Argument was it ever contended by defendant that his confession was obtained by promises." (Petition for Rehearing, page 4.) The People are being neither fair nor candid with Your Honors. In our original Brief, at page 23, the following appears:

"For example, the defendant testified that he gave his statement because he had been offered the equiva-

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[1] As will be more fully developed, it is respectfully submitted that these facts, *ispo facto*, render any ensuing statement inadmissible as violative of the Fourteenth Amendment of the United States Constitution.

> [fol. 244] lent of a grant of immunity (Abst. 37.) Had he received the advice of counsel, he could have weighed the offer and rejected it as coming from one who had no authority to make such a grant. Rather, legally uniformed, he accepted the 'offer' which, of course, was completely illusory and was even denied by the offeror (Abst. 24, 28.)"

And in our Reply Brief, in enumerating those circumstances which disclose much more than a bare "lack of counsel * * * alone," defendant again asserted,

> "Here there was a promise of immunity given as an illegal inducement by a sophisticated interrogator to an untutored suspect" (Reply Brief, p. 8).

Moreover, as Your Honors will recall, the effect of the promise of immunity was repeatedly argued by counsel for defendant at the oral argument of this cause. Indeed, rather than abandoning such an allegation, defendant has repeatedly asserted, and continues to assert, that such promise was a principal factor in causing him to "yield to * * * the suction process of interrogation." (*People* v. *Price*, 24 Ill. 2d 46, 54.)

In its opinion, this Court stated that "from the undisputed evidence [the denial of counsel] and the circumstances surrounding the defendant at the time of his statement and shortly prior thereto, it seems manifest to us, that the defendant understood he would be permitted to go home if he gave a statement and would be granted an immunity from prosecution." (Opinion, p. 3, quotation transposed for emphasis).

At this point it is well to detail those "circumstances". The defendant entered into the interrogation process intent on making no statement. Yet, at the end of the interrogation process, and in contravention of the prior [fol. 245] advice of counsel and in prejudice to his cause, a statement was obtained. It is inescapable that matters transpired during the interrogation ordeal to which the defendant eventually yielded. This Court properly determined, "in spite of the fact that the officers denied making any promises of leniency, it seems manifest" that such were made and that such had the desired effect of eliciting an

otherwise unavailable statement. No less than any others, Your Honors need not blindly accept the denials of these lawbreaking police[2] where the manifestly patent conclusion is that promises were given and were relied upon by the defendant. Any argument by the People that no promises were made is clearly "manifestly against the weight of the evidence." (*People* v. *Weger*, 25 Ill. 2d 370, 374) and need not be given any effect by this Honorable Court.

The defendant is not asking this Court to "re-examine diametrically opposed evidence", as the People suggest in their Petition for Rehearing, but is merely asking that this Court, as it has so often done in the past, set aside findings that are manifestly against the weight of the evidence in light of all the circumstances disclosed by the record.

The People observed in their original Brief and Argument that lack of counsel alone will not render a confession involuntary. (pp. 4, 5.) However, as detailed in page 8 of plaintiff in error's Reply Brief, and as enu- [fol. 246] merated on oral argument in response to a question posed by Mr. Justice Daily, there are many additional circumstances present over and above the undisputed denial of counsel and the manifestly warranted conclusion of promised immunity and leniency.

Under the authority of *People* v. *Price*, 24 Ill. 2d 46, and in conformance with the heretofore announced standard of the United States Supreme Court in *Crooker* v. *California*, 357 U. S. 433, and *Spano* v. *New York*, 360 U. S. 317, the totality of circumstances in the case at bar disclose that the resultant statement of the defendant cannot be said to have been made "freely, voluntarily, and without compulsion or inducement of *any* sort," (24 Ill. 2d at 58) for if there had been no psychological pressure and no compulsion and inducement, defendant would not have "yielded" and no statement would have been secured.

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[2] It is uncontroverted that, in arresting the defendant, without charge, for the purpose of obtaining a confession, the police were in violation of Ill. Rev. Stats., Ch. 38, Sec. 379. It is also manifest that in denying defendant and his counsel the right to consult with each other upon request, the police were in violation of Ill. Rev. Stats., Ch. 38, par. 477, and 499.1.

The opinion of this Court recognized all the competing arguments advanced by both sides. The opinion of this Court fairly and accurately stated all the relevant factors. A proper conclusion was reached. Wherefore, it is respectfully prayed that the determination of this Court that the pre-trial statement was inadmissible in evidence be adhered to and the conviction of plaintiff in error be reversed.

[fol. 247] II. A Pre-Trial Statement of an Accused, Being Elicited By an Interrogation While in Police Custody After the Police Have Illegally Refused the Constitutionally and Statutorily Guaranteed Right of Consultation with Counsel, is Ispo Facto Inadmissible in Evidence as Having Been Obtained in Violation of the Right Secured an Accused By the Fourteenth Amendment to the Constitution of the United States.

In the instant case the following facts are not in dispute and are clearly established.

1. The defendant was a 22-year-old male.

2. On the night in question, he was arrested by the police, and, though not charged with any crime, was taken incommunicado to police headquarters solely for investigation (Abst. 116, 117).

3. An Illinois statute then in force made it a felony offense for two or more persons to "imprison another • • • for the purpose of obtaining a confession." (Ill. Rev. Stat., Ch. 33, Sec. 379 (repealed Jan. 1, 1962)). See *People* v. *Frugoli*, 334 Ill. 324, 333.

4. "Upon arrival at the station, plaintiff in error requested to see his lawyer, but was told his lawyer did not want to see him." (Opinion p. 1)

5. "At 10:30 the attorney came to the station asking to see his client. The officer on duty refused to allow it. The attorney proceeded to the Homicide Bureau, where plaintiff in error was being questioned, but was prevented from entering. Although he identified himself, named the person he was representing, and called attention to the right of consultation, the officers persisted in their refusal. They told him he could not see his client because they were not through with him. All [fol. 248] the attorney managed to do was catch a

glimpse of plaintiff in error, and he finally left the Detective Bureau about 1:00 a.m. without being permitted to interview or advise him." (Opinion p. 1)

6. Illinois Statutes then in force *required* the police to "admit any practicing attorney at law of this state, whom such person so restrained of his liberty may desire to see or consult, to see or consult such person so imprisoned, *alone and in private,* at the jail or other place of custody." (Ill. Rev. Stat., 1959, Ch. 38, par. 477, cited in *People* v. *Nemke,* 23 Ill. 2d 591).

7. A further Illinois statute, then in force, made it a criminal offsense for those, such as the police in the instant case, to deny a person in custody "his right to consult and be advised by an attorney at law whether or not such person is charged with a crime." (Ill. Rev. Stat. 1959, Ch. 38, par. 449.1, cited in *People* v. *Nemke,* 23 Ill. 2d 591).

8. The police, by the actions in the case at bar, were in violation of the aforementioned statutes.

9. The statement of the accused was obtained while he was being thus illegally detained and after he and his attorney had been denied their right of private consultation.

These facts are all undisputed. Nowhere do the People contend otherwise.

It is respectfully submitted that, under the language of the cases heretofore decided by the United States Supreme Court, that the statement of the defendant obtained under the above facts was obtained in violation of the rights granted the accused under the Fourteenth Amendment of the Constitution of the United States, and is inadmissible as a matter of law.

[fol. 249] At the outset, plaintiff in error recognizes that, as yet, this Court has declined to hold that similar denials of counsel do not themselves render a confession incompetent (*People* v. *La Frana,* 4 Ill. 2d 261). In *People* v. *Nemke,* 23 Ill. 2d 591, this Honorable Court considered the problem but, disposing of the case on another ground, indicated its reluctance to so rule.

Nevertheless, in the principal Brief and Argument for plaintiff in error, this proposition was again proposed and

detailed argument was made in the affirmative. It was argued that:

A. Justice required that the obtaining of any semblance of equality before the Court is based upon the lawyer-client relationship (Brief pp. 27-29).

B. The immediate right to counsel is recognized by the statutes of this State, yet these exist as mere words because, to date, this potent deterrent has not been availed of (Brief, pp. 29-33).

C. The State will not be prejudiced by such a rule of exclusion (Brief, pp. 33-36).

The People have contented themselves by asserting that the adoption of such a rule would preclude all confessions (See however, the authorities cited at pp. 34 and 35 of our original Brief) and by the further statement, made in open court on oral argument before Your Honors, that unless the police are allowed to violate the statutes with impunity, they cannot achieve confessions. This, of course, justifies the means by the ends—a totalitarian technique. The argument of the People therefore reduces itself to a request that this Court sanction actual violations of law by the police in order to extract confessions, regardless of their trustworthiness or voluntariness, in order to attempt to convict persons merely suspected of having violated the law.

[fol. 250] The United States Supreme Court, in the case of *Crooker* v. *California*, 357 U. S. 433, discussed the problem similar to that posed by the present case. In a 5-4 decision,[3] the majority held that the "totality of circumstances" must be looked at to determine if a refusal of the police to allow the accused person in custody consultation with his attorney resulted in a denial of the Fourteenth Amendment Due Process Clause so as to invalidate a confession. There the majority felt that since the prisoner was a college graduate, had attended law school and taken a

[3] The majority of that Court was composed of Justices Clark, Frankfurter, Burton, Harlan, and Whittaker. The minority was composed of Justices Warren, Douglas, Black and Brennan. Of the majority, only Justices Clark and Harlan remain on the bench today.

course in criminal law, had full knowledge and awareness of all his rights, and had given an admittedly voluntary confession, no denial of that defendant's right to Due Process had occurred.

On the other hand, the minority opinion, authored by Mr. Justice Douglas, would have reversed the conviction and invalidated the confession on the sole showing of the refusal of the right to consult with counsel. "This demand for an attorney was made over and again prior to the time a confession was extracted from the accused. Its denial was in my view a denial of that Due Process of Law guaranteed to the citizen by the Fourteenth Amendment." Stating that confessions received after a deprivation of an accused's right to Due Process should be excluded, the minority opinion concluded,

> "The demands of our civilization expressed in the Due Process Clause [of the Fourteenth Amendment] [fol. 251] require that the accused who wants a counsel should have one at any time after the moment of arrest."[4]

The Supreme Court has not yet, since the retirement of three Justices who participated in that majority opinion, had occasion to reconsider whether the "totality of facts" doctrine should continue to be applied in preference to the "*ipso facto*" rule espoused by the minority, all of who remain on the bench today. However, in the intimately related area of the right of indigents to counsel at trial, the Court has recently had the opportunity to accomplish a similar reappraisal.

In *Betts* v. *Brady*, 316 U. S. 455, the Supreme Court, in a 6-3 decision (Justices Black, Douglas and Murphy dissenting) held that the Due Process Clause of the Fourteenth Amendment did not require the appointment of counsel for indigent prisoners in State courts for trial of

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[4] Mr. Justice Douglas thereupon cited our Illinois Statute, previously referred to, as being one which, among others, does provide the "procedural safeguard against coercive police practices."

non-capital crimes. It further held that "asserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case" (316 U. S. at 462), and that, only if the refusal to appoint counsel for an indigent accused could be said, in the totality of the circumstances, to have amounted to a denial of Due Process, would the conviction be reversed.

On the other hand, Mr. Justice Black, speaking for the minority, reasoned that Due Process required the appointment of counsel and that such refusal to appoint, *ipso facto*, invalidated the conviction.

Under factual circumstances virtually identical to those in *Betts* v. *Brady, supra,* the Supreme Court at the [fol. 252] present term had the opportunity to re-examine the *Betts* doctrine. In *Gideon* v. *Wainwright,* a decision handed down on March 18, 1963 (83 S. Ct. 792) a unanimous court overruled *Betts* v. *Brady*, and, in an opinion authored by Mr. Justice Black, held that the denial of appointed counsel *ipso facto* invalidated the conviction. The present Court has thus rejected the "totality of facts" test and substituted in its place the "*ipso facto*" doctrine. The three Justices who were not present on the Court when it decided *Crooker* v. *California* (Justices Stewart, White and Goldberg) all joined in Mr. Justice Black's opinion without reservation. It is manifest, therefore, that the same result would again obtain when the Court will be faced with the problem posed by the case at bar.[5]

The same legal dichotomy present in *Betts* as contrasted with *Gideon* is presented when *Crooker* is contrasted with this case. Formerly, the Court adopted the "totality of circumstances" test. (*Betts* v. *Brady, supra; Crooker* v. *California, supra*) Today, however, the Court has modified its approach and has substituted the "*ipso facto*" approach (*Gideon* v. *Wainwright, supra*). Accepting this announced modification in approach, it is manifest that the fate of

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[5] Plaintiff in error further respectfully requests that, in considering the contention made herein, attention should also be given to the opinion of the United States Supreme Court in *Townsend* v. *Sain,* 83 Sup. Ct. 745, also decided, March 18, 1963.

Crooker v. *California* will be the same as the fate of *Betts* v. *Brady, i.e.*, it will be reversed when the Court is presented with the opportunity for reconsideration of the *Crooker* rule. The persuasive analysis of Mr. Justice Douglas in his opinion in *Crooker* is valid today. The cogent reasons therein apply with singular force to the present case.

[fol. 253] This Court should not allow this opportunity, voluntary to adopt the benevolent and just rule, to evaporate only to later be forced to accept it when the highest judicial authority in the land so commands.

Plaintiff in error respectfully submits that, for the reasons propounded in our original Brief and Argument, this Court avail itself of the opportunity to announce the rule for Illinois, inevitably to be adopted by the United States Supreme Court for all the States, that would invalidate any pre-trial statements received from an accused after he has requested and been denied his acknowledged right to consult with his counsel. Accordingly, the decision of this Court of February 1, 1963, invalidating defendant's pre-trial statement, should be adhered to, not only for the reasons announced therein but also on the ground that such statement was improperly obtained in contravention of defendant's rights guaranteed by the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Respectfully submitted, Jacobs and McKenna, 135 South LaSalle Street, Chicago 3, Illinois, Attorneys for Plaintiff in Error.

Eugene J. Farrug, Donald M. Haskell, Barry L. Kroll, Of Counsel.

[fol. 254] IN THE SUPREME COURT OF ILLINOIS

Docket No. 36707—Agenda 58—March, 1963

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error

v.

DANNY ESCOBEDO, Plaintiff in Error

OPINION ON REHEARING—May 27, 1963

Mr. JUSTICE HOUSE delivered the opinion of the court:

Danny Escobedo was indicted in the criminal court of Cook County for the murder of his brother-in-law, Manuel Valtierra. A jury found him guilty and fixed his sentence at 20 years confinement in the penitentiary. He seeks a review of the conviction on this writ of error.

The record shows that Manuel Valtierra was murdered in the backyard of his home on January 19, 1960. The evidence connecting defendant with the murder is his confession. It shows that decedent was married to defendant's sister, that decedent and defendant had argued about decedent frequently beating the sister and that on January 19, 1960, defendant hired Benedict DiGerlando to murder his brother-in-law.

It is first argued that the trial court erred in admitting the confession into evidence. The defendant was immediately suspected of implication in the crime and was questioned on January 20 and at various other times, but there was not sufficient evidence to hold him. On January 30, 1960, DiGerlando was in custody and between 7:30 and 8:00 P.M. he made a statement to the police in which he named defendant as the one who fired the shots killing Valtierra. Defendant and his sister were arrested about 8:00 or 9:00 P.M. While they were on their way to the police station, Gerald Sullivan, one of the arresting officers, told defendant that DiGerlando had named him as the one who shot Valtierra. Defendant said he wanted to hear DiGerlando say that. Officer Montejano saw defendant about 10:00 and again repeated to him what DiGerlando said. Defendant said DiGerlando was lying. Montejano then asked defendant if he would like to hear DiGerlando

say it and defendant said yes. After DiGerlando had accused defendant of shooting Valtierra at their confrontation, defendant told officers Montejano and O'Malley that DiGerlando was the one who fired the shots. Officer Flynn arrived about this time, 10:15 P.M., with officers Sullivan and McNulty, and officers Montejano and O'Malley left. Defendant told Flynn in the presence of Sullivan and McNulty that DiGerlando had done the shooting. About 11:30 assistant State's Attorney Theodore Cooper and court reporter Don Flannery arrived at the homicide bureau. De-
[fol. 255] fendant then made the confession to Cooper. Cooper, Flannery and Montejano were present when the confession was made.

Warren Wolfson, defendant's attorney, arrived at the police station about 10:30 P.M. He asked several officers for permission to see defendant. After his requests were denied he showed the officers the statutes concerning the right of an attorney to see his client. He left the station about 1:00 A.M. without having had a chance to consult with his client.

The defendant on direct examination testified that when he arrived at the police station he asked to see his lawyer. He said that Montejano approached him about 10:00 or 10:30 and told him that "DiGerlando had already made a statement saying that he shot the man, my brother-in-law, and he would see to it that we would go home and be held only as witnesses, if anything, if we had made a statement against DiGerlando." He said he gave no statement to Montejano after the promise was made and made no statement until the assistant State's Attorney arrived. Defendant's attorney then asked if the statement was true and defendant replied, "No it isn't." The attorney then asked, "Why did you make this statement to the State's Attorney?" The defendant answered, "I seen that my sister was being put at the head of this crime and I knew she had not done it and I wanted to help my sister and that is the reason why I made the statement." His attorney apparently was not content with this answer inasmuch as he asked the following questions:

"Q. Did the fact that you had been made promises by Montejano have any bearing upon your making this statement?

"A. Yes, it did.
"Q. Did the fact that the police officers had made promises specifically that you would not be prosecuted if you made this statement have any effect on your making that statement?
"A. Yes, it did.
"Q. Were these promises in fact the motivation that made you make this statement?
"A. Yes."

With a number of other leading questions the attorney also brought out that Montejano spoke to defendant in Spanish and told him that he had gone to school with his brother and could help him and that "Benny is Italian and there is no [fol. 256] use in a Mexican going down for an Italian."

The defendant did not accuse any of the police officers with having beaten or threatened him. He said the promises made by Montejano were not made in the presence of any of the other officers and he did not tell the assistant State's Attorney of the alleged promises when he made the confession.

The police officers, assistant State's Attorney and the court reporter all testified that neither they nor anyone in their presence beat, threatened or made any promises to defendant. Officer Montejano denied that he made any promises to defendant or that he spoke to him in Spanish.

Under the circumstances disclosed by this record the trial court did not err in denying the motion to suppress the confession. The defendant was 22 years old. There is nothing to show he is of subnormal intelligence. On the contrary, the trial judge after hearing his testimony remarked, "I was impressed with this defendant's intelligence. I don't know how old he is, but he certainly is not ignorant by a long stretch of the imagination. He is pretty keen * * *." There is no suggestion of brutality or long and coercive questioning. While much is made of the circumstance that his request to consult with counsel was not immediately honored, the record shows that he had previously consulted with his attorney about the case and that he understood from a motion the lawyer made to him at the police station that he should not talk to the police. Although defendant testified that one officer made a prom-

ise to him, his testimony indicates that he did not rely on this alleged promise when making the statement. In any event, the officer denied making the promise and the trier of fact believed him. We find no reason for disturbing the trial court's finding that the confession was voluntary.

Defendant argues then that the confession is inadmissible because it was obtained after he had requested the assistance of counsel, which request was denied. A minority of the Supreme Court in the cases of *Crooker* v. *California*, 357 U.S. 433, 441, 2 L. ed. 2d 1448, 1455, 78 S. Ct. 1287, 1292, (dissenting opinion); *Cicenia* v. *LaGay*, 357 U.S. 504, 511, 2 L. ed. 2d 1523, 1529, 78 S. Ct. 1297, 1301 (dissenting opinion); *Ashdown* v. *Utah*, 357 U.S. 426, 431, 2 L. ed. 2d 1443, 1447, 78 S. Ct. 1354, 1357 (dissenting opinion); *Spano* v. *New York*, 360 U.S. 315, 324, 3 L. ed. 2d 1265, 1272, 79 S. Ct. 1202, 1207 (concurring opinion), [fol. 257] and *Culombe* v. *Connecticut*, 367 U.S. 568, 637, 6 L. ed. 2d 1037, 1077, 81 S. Ct. 1860, 1897 (concurring opinion), have expressed the view that denial of request for counsel by a suspect is denial of "the Assistance of Counsel for his defence" guaranteed by the sixth and fourteenth amendments and that a confession obtained after such denial cannot be used as evidence against him. This view was not adopted by a majority of that court in those cases, however, and specifically rejected in *Crooker* and *Cicenia*. The majority of the court held that "due process does not always require immediate honoring of a request to obtain one's own counsel in the hours after arrest" (*Crooker* v. *State of California*, 357 U.S. 433, 441, n. 6, 78 S. Ct. 1287, 1292, n. 6), but that the lack of counsel during the interrogation is "one pertinent element in determining from all the circumstances whether a conviction was attended by fundamental unfairness." (*Cicenia* v. *LaGay*, 357 U.S. 504, 509, 78 S. Ct. 1297, 1300.) Denial of request for counsel during interrogation by the police, in and of itself, has not therefore been recognized as a denial of due process under the fourteenth amendment requiring exclusion of defendant's confession.

Defendant, nevertheless, urges this court to announce a rule which would prevent the use of a confession where there has been a denial of a request for assistance of counsel during the interrogation which produced the con-

fession. This court has recognized that a voluntary confession is often the highest type of evidence of the confessor's guilt and that such evidence should not be excluded except for some overriding public interest. (*People* v. *Hall*, 413 Ill. 615.) Mr. Justice Traynor of the California Supreme Court has stated it this way: "The perpetrator of a crime is normally the one who knows most about it, and his confession, voluntarily made is often the best evidence of his guilt that can be obtained. [Citations.] Only overwhelming social policies can justify the exclusion of such vital evidence. In the case of coerced confessions, the evidence may be unreliable; even if reliable, a free society cannot condone police methods that outrage the rights and dignity of a person whether they include physical brutality or psychological coercion. [Citations.] When a confession is voluntary, however, courts are reluctant to exclude it." (*People* v. *Garner*, 57 Cal. 2d 135, 162-63, (concurring opinion).) Indeed, this court has recognized its duty to permit the use of such evidence where it has [fol. 258] been voluntarily given. *People* v. *Hall*, 413 Ill. 615.

Having briefly examined the basic principles underlying the admission or exclusion of a confession, we turn to the interrelationship between confessions and interrogation. Professor Inbau has pointed out, "human beings ordinarily do not utter unsolicited, spontaneous confessions. They must first be questioned regarding the offense. * * * [I]t is impractical to expect any but a very few confessions to result from a guilty conscience unprovoked by an interrogation." (Inbau, Restrictions in the Law of Interrogation and Confessions, 52 Nw. U. L. Rev. 77, 82.) "The police may be midwife to a declaration naturally born of remorse, or relief, or desperation, or calculation." *Culombe* v. *Connecticut*, 367 U.S. 568, 576, 81 S. Ct. 1860, 1864.

The right of the police to interrogate suspects has never been seriously questioned. Indeed such right is recognized in the many decisions of this court holding that a confession need not proceed wholly at the suggestion of the accused in order to be voluntary but that it may be elicited by questions asked by the police. (*People* v. *Miller*, 13 Ill. 2d 84; *People* v. *Board*, 11 Ill. 2d 495; *People* v. *Davis*, 10 Ill. 2d 430; *People* v. *Lazenby*, 403 Ill. 95.)

"Despite modern advances in the technology of crime detection, offenses frequently occur about which things cannot be made to speak. And where there cannot be found innocent human witnesses to such offenses, nothing remains —if police investigation is not to be balked before it has fairly begun—but to seek out possibly guilty witnesses and ask them questions, witnesses, that is, who are suspected of knowing something about the offense precisely because they are suspected of implication in it." (*Culombe* v. *Connecticut*, 367 U.S. 568, 571, 81 S. Ct. 1860, 1861.) In short, "Questioning suspects is indispensable in law enforcement," (*People* v. *Hall*, 413 Ill. 615, 624, quoted in *Culombe* v. *Connecticut*, 367 U.S. 568, 578, 81 S. Ct. 1860, 1865,) and the police have not only the right but the duty to question suspects. (See *State* v. *Smith*, 32 N.J. 501, 161 A. 2d 520.) A valid basis for allowing confessions solicited by fair and reasonable questioning is that such questioning may open the door to the natural psychological compulsion to confess, which has been recognized and described. (See Wigmore on Evidence, 3rd ed. § 851.) "So long as the methods used comply with due process standards, it is in the public interest for the police to encourage confessions [fol. 259] and admissions during interrogation." *People* v. *Garner*, 57 Cal. 2d 135, (concurring opinion); see also Wigmore, 3rd ed. § 851.

This brings us to the question of whether a suspect has the right to assistance of counsel during the interrogation. Allowing counsel to be present during interrogation of a suspect would, of course, afford him some protection against possible mistreatment by the police (*Crooker* v. *State of California*, 357 U.S. 386, 441, 78 S. Ct. 1280, 1293 (dissenting opinion) and provide him with legal advice. (*Culombe* v. *Connecticut*, 367 U.S. 568, 637, 81 S. Ct. 1860, 1897 (dissenting opinion).) The attorney's role during police interrogation would not, however, be limited to preventing police mistreatment or advising him of his right against self-incrimination. Mr. Justice Jackson laid bare the problem with these remarks: "To bring in a lawyer means a real peril to solution of the crime because, under our adversary system, he deems that his sole duty is to protect his client—guilty or innocent—and that in such a capacity he owes no duty whatever to help society solve

it crime problem. Under this conception of criminal procedure, any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to the police under any circumstances." (*Watts* v. *Indiana*, 338 U.S. 49, 59, 93 L. ed. 1801, 1808, 69 S. Ct. 1357, 1358 (concurring opinion).) This sentiment was recognized in *Crooker* v. *California* ("it would effectively preclude police questioning—*fair as well as unfair*," 357 U.S. 433, 441, 78 S. Ct. 1287, 1292,) and in *Cicenia* v. *LaGay* (it "would constrict state police activities in a manner that in many instances might impair their ability to solve difficult cases." 357 U.S. 504, 509, 78 S. Ct. 1297, 1300).

Common sense dictates that the presence of an accused's attorney would preclude effective police interrogation even though the questioning be fair. The law, of course, protects an accused whose will to confess has been overborne by excluding the use of the confession as evidence against him. It does not follow, however, that he is entitled to have someone present, who under the auspices of giving legal advice, warns and advises him against reacting to his first natural sensations to confess. As long as the questioning is fair, incriminating statements of an accused are not likely to result from any idea that he must answer, that is as a result of his ignorance of his right against self-incrimination, but are likely to result from his free choice [fol. 260] to make them. In any event, it is possible for someone other than his attorney to advise him of his right against self-incrimination and let the accused invoke the right rather than his attorney. The exclusion of a voluntary confession made outside the presence of counsel or the preclusion of effective interrogation by the presence of counsel is a high price to pay for whatever deterrent effect the presence of counsel would have on police abuses. If the police abuse their right to interrogate, the confession will be excluded.

This case bears out the above observations. The defendant was immediately suspected of implication in the crime. The murder occurred about midnight and the police had located him and taken him into custody within two and a half hours. He was held from 2:30 A.M. until 5:00 P.M. that evening when his attorney secured his release on a writ of *habeas corpus*. He was questioned during a part

of this 17-hour period, but he did not confess. There is no suggestion of any beating, threats or promises by the police during this period. The record also shows that defendant was questioned by the police after his release on January 20 and before he was again taken into custody on January 30. This questioning did not result in a confession. This would indicate that ignorance of his right against self-incrimination, if it existed, did not cause him to confess during interrogation while in custody on January 20 or interrogation while not in custody between January 20 and January 30.

DiGerlando was in custody on January 30 and between 7:30 and 8:00 P.M. told the police that defendant had fired the shots that killed decedent. The police then took defendant into custody and told him what DiGerlando had said. Defendant testified that he asked for his lawyer. His lawyer arrived shortly after he was taken into custody and demanded to see his client. Lieutenant Flynn told the lawyer that they had just had defendant in custody a short time, that they were questioning him and that he could see defendant as soon as they were done.

While it is argued that the attorney was there to consult with the defendant, the record shows that the attorney and defendant had talked about the case a few days before. The lawyer had 10 days before the arrest on January 30 to consult with defendant and was advised that he could again consult with him after the police had had a reasonable opportunity to interrogate him.

[fol. 261] The nature of the advice the attorney was going to give the defendant also appears from the record. While the lawyer was talking to Lieutenant Flynn, defendant was sitting where he could see the lawyer and the lawyer could see him. The lawyer apparently yelled to defendant not to talk to the police, although defendant testified that he did not understand what he yelled. Defendant did testify, however, that the attorney motioned to him with his head which he understood to mean that he should not talk to the police.

It seems apparent that the confrontation with DiGerlando precipitated the confession. As Professor Wigmore has pointed out, "every guilty person is almost always

ready and desirous to confess, as soon as he is detected and arrested." (Wigmore on Evidence, 3rd ed. § 851.) All the questioning prior to January 30 did not affect defendant, but as soon as he was confronted by DiGerlando he confessed. If the lawyer had been present to give the advice he was trying to give, defendant might have reacted from his first sensations, yielded to his lawyer's solicitations, and come "under the sway of the natural human instinct to struggle to save himself by the aid of all technicalities." Wigmore on Evidence, 3rd ed. § 851.

Defendant, of course, had the right to consult with counsel at the pretrial stages of the criminal proceeding. Our legislature has provided that "all public officers * * * having the custody of any person * * * for any alleged cause whatever, shall, except in cases of imminent danger of escape, admit any practicing attorney at law of this state, whom such person so restrained of his liberty may desire to see or consult, to see and consult such person so imprisoned, alone and in private, at the jail or other place of custody; * * *." (Ill. Rev. Stat. 1961; chap. 38, par. 736c.) The legislature has also made it a misdemeanor for anyone, while holding another person in custody, to deny that other person his right to consult and be advised by an attorney at law. (Ill. Rev. Stat. 1961, chap. 38, par. 736b.) These statutes show a legislative policy against the police or other public officers insulating a person from his attorney, but it does not follow that the legislature intended that the statutes operate to insulate the person from the police or other public officials.

We have, of course, examined and considered the views of many courts and commentators to which we have not specifically referred in considering this problem. (See *e.g.* [fol. 262] *People* v. *Garner*, 57 Cal. 2d 135, 367 P. 2d 680; *People* v. *Di Bari*, 7 N.Y. 2d 544, 166 N.E. 2d 825; *People* v. *Waterman*, 9 N.Y. 2d 561, 175 N.E. 2d 445; *State of Oregon* v. *Kristich*, 226 Ore. 240, 359 P.2d 1106; Kamisar, "The Right to Counsel and the Fourteenth Amendment," 30 U. of Chi. L. R. 1; Rothblatt & Rothblatt, "Police Interrogation: The Right to Counsel and to Prompt Arraignment," 27 Brooklyn L. Rev. 24; Boyle, "Permissible Police Practice: Recent Developments," 46 Marquette L. Rev. 227.) Having

given due weight to the various considerations involved, we are of the opinion that the right of a person in custody to see and consult with his attorney does not deprive the police of their right to a reasonable opportunity to interrogate outside the presence of counsel.

Defendant then argues that he was not proved guilty beyond a reasonable doubt. This argument is based on some discrepancies as to the time and presence of various persons during the questioning. The confession was properly admitted in evidence and the jury believed it. There was evidence sufficient to prove his guilt beyond a reasonable doubt.

It is finally argued that the prosecutor made prejudicial remarks during his closing argument. We have examined these remarks and find that they are not of such a nature as would justify a reversal of this conviction.

The judgment of the criminal court of Cook County is affirmed.

Judgment affirmed.

[fol. 263] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1963

No. 320 Misc.

DANNY ESCOBEDO, Petitioner,

vs.

Illinois

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND PETITION FOR WRIT OF CERTIORARI—November 12, 1963.

On petition for writ of Certiorari to the Supreme Court of the State of Illinois.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed

in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 615.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 615

[redacted]

DANNY ESCOBEDO,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF FOR RESPONDENT IN OPPOSITION.

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JAMES R. THOMPSON,
Assistant State's Attorneys,
Of Counsel.

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CASE CITATIONS.

MISCELLANEOUS CITATIONS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 320 Misc.

DANNY ESCOBEDO,

Petitioner,

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THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINION BELOW.

The opinion of the Supreme Court of Illinois (App. B of Petition) is reported at 28 Ill. 2d 41; 190 N. E. 2d 825.

JURISDICTION.

The jurisdictional requisites are adequately alleged in the Petition.

QUESTIONS PRESENTED.

I. Whether, under the facts as found by the Supreme Court of Illinois petitioner's confession was voluntary or was coerced in violation of the due process of law guaranteed by the Fourteenth Amendment?

II. Whether the denial of counsel during police interrogation, without regard to any other circumstances, bars the use of a confession obtained after such denial—should this Court reconsider its holdings in *Crooker* v. *California*, 357 U. S. 433 and *Cicenia* v. *LaGay*, 357 U. S. 504?

STATEMENT OF THE CASE.

I.

Preliminary Statement.

Petitioner's statement of the facts as required by Rule 23(1)(e) of this Court is unsatisfactory for the reason that the "facts" relied upon by petitioner to support his arguments—especially the argument that the totality of circumstances found in this record show the confession to have been involuntary (Pet. 7-9)—are, in large measure, disputed. In order to rely upon these "facts," which are scattered through both the Statement of the Case (Pet. 3-5) and the Reasons for Granting the Writ (Pet. 8-9), petitioner claims that,

> "This Court, because of the delicate nature of the constitutional determination to be made, is obliged to make its own examination of the record *rather than be bound by the findings of fact of the court below. Spano* v. *New York.*" (Pet. 4-5) (Emphasis added.)

This statement of petitioner is not the law and the opinion of this Court in *Spano* v. *New York,* 360 U. S. 315 is certainly not authority for such a claim. In fact, this Court has repeatedly announced exactly the opposite rule. Mr. Justice Frankfurter once put it this way:

> "Nevertheless, in all the cases that have come here during the last decade from the courts of the various States in which it was claimed that the admission of coerced confessions vitiated convictions for murder, there has been complete agreement that any conflict in testimony as to what actually led to a contested confession is not this Court's concern. Such conflict comes here authoritatively resolved by the State's adjudication.

> Therefore only those elements of the events and circumstances in which a confession was involved that are unquestioned in the State's version of what happened are relevant to the constitutional issue here." *Watts* v. *Indiana*, 338 U. S. 49, 51-52.

This view was affirmed in *Thomas* v. *Arizona*, 356 U. S. 390, 402-403 ("Time and again we have refused to consider disputed facts when determining the issue of coercion") and was reaffirmed by the Court's recent opinion in *Rogers* v. *Richmond*, 365 U. S. 534, 536:

> "In coerced confession cases coming directly to this Court from the highest court of a State in which review may be had, we look for 'fact' to the *undisputed*, the *uncontested* evidence of record." (Emphasis added.)

II.

Petitioner's Erroneous Facts.

We reject the following assertions of "fact" set forth in the Petition for Certiorari for which there is no record support, or upon which the evidence in the record is in dispute.

(1) "He [petitioner] appeared *very exhausted*, according to the police lieutenant, who stated: 'He was nervous, had circles under his eyes and he was upset.' " (Pet. 3-4) (Emphasis added.)

"He was *exhausted*, upset, nervous and had circles under his eyes. All of the foregoing is undisputed in the record." (Pet. 8-9) (Emphasis added.)

Nowhere in the record is there any testimony to support the assertion that petitioner was "exhausted" while undergoing police questioning. The only time that word was mentioned was *in a question* during the cross-examination of Lieutenant Flynn:

"Q. Now, you said that Danny Escobedo told you

that he had been—you say he appeared to be very exhausted?

A. He was nervous, he had circles under his eyes and he was upset." (Abst. 110.)[1]

(2) "According to the testimony of petitioner Officer Fred Montejano spoke to him in Spanish (A40). Petitioner further testified that Montejano promised him that he would not be prosecuted if he made a statement, and further promised him that he and his sister could go home and would be used only as witnesses against one Benedict DiGerlando, the alleged assassin (A37). Montejano, petitioner also testified, spoke to him as a friend of his brother's and stated, 'Benny is Italian and there is no use in a Mexican going down for an Italian' (A40)." (Pet. 4.)

All of these specific assertions were met with specific denials on the part of Officer Montejano (Abst. 24, 27, 28, 70) and as the Supreme Court of Illinois recognized in its opinion, "In any event, the officer denied making the promise and the trier of fact believed him." *People* v. *Escobedo*, 190 N. E. 2d 825, 827.

(3) "After all of the foregoing transpired, petitioner *reluctantly* dictated a court-reporter statement to an Assistant State's Attorney shortly before midnight (A39)." (Pet. 4) (Emphasis added.)

There is no record support for the assertion that the formal confession was given "reluctantly".

(4) "He [petitioner] was therefore unaware that the pre-trial statement being solicited could be self incriminating. Rather he thought it was merely a witness statement to be used against DiGerlando." (Pet. 6.)

---

1. Record references are to the Abstract filed by Petitioner in the Supreme Court of Illinois.

There is no record support for this statement.

(5) "And, when all of these were still insufficient to cause him to give any statement, he was finally induced to make a statement accusing another as the assassin by a promise that he and his sister would be released and that his statement would only be used against the assassin." (Pet. 9.)

There is no record support for this statement, and as discussed under point (3) above, it was specifically denied by Montejano (Abst. 28, 70).

III.

The Facts.

Petitioner's brother-in-law, Manuel Valtierra, was murdered in the backyard of his home around midnight on the evening of January 19, 1960 (Abst. 76, 79). Following the murder, petitioner was arrested at approximately 2:30 A. M. on January 20, 1960 and taken to the Fillmore station for questioning. He was not handcuffed, and after he denied all knowledge of the crime he was released at approximately 5:00 P. M. that evening (Abst. 36), apparently because his lawyer had obtained a writ of habeas corpus for his release (Abst. 23). Thereafter, according to the lawyer, he and petitioner conferred daily (Abst. 23). Sometime around January 27 or 28, 1960 petitioner's lawyer, Warren Wolfson, told him that if he "was arrested at any time to tell the officers in a nice way that I was sorry but could not talk to them until I had the advice of my lawyer." (Abst. 42.) Between January 20 and January 30, 1960 Officer Fred Montejano questioned petitioner on the street but did not take him into custody when petitioner refused to make a statement (Abst. 25).

On January 30, 1960, at approximately 7:45 P. M., a man by the name of Benedict DiGerlando was in police custody

and told them that petitioner had killed Valtierra (Abst. 29-30). Petitioner was thereupon re-arrested at approximately 8:30 or 9:00 P. M. that same evening and while being driven to police headquarters at 11th and State Streets he was informed of DiGerlando's statement. Petitioner replied that he would like to hear DiGerlando say it to his face (Abst. 55, 57).

After his arrival at headquarters, petitioner was questioned by Officer Montejano and other officers (Abst. 24, 27, 28, 56-57). After again denying DiGerlando's accusation, Montejano and Officer O'Malley brought him into the room where DiGerlando was being held. Petitioner then accused DiGerlando of doing the shooting (Abst. 69, 133-135).

At around 10:15 P. M. Deputy Chief of Detectives Flynn talked to petitioner in the presence of officers Sullivan and McNulty, and petitioner told him that "he wasn't going to be the fall guy, that a fellow by the name of Benny DiGerlando was the one that had shot his brother-in-law." (Abst. 32.) Petitioner told Flynn that he had agreed with his sister to get rid of Valtierra and that he had procured DiGerlando to do the killing while he drove the get-away car (Abst. 102-104). Flynn then questioned DiGerlando and had petitioner brought into DiGerlando's presence for a few questions (Abst. 108, 110-111).

The State's Attorney's office was then notified and Assistant State's Attorney Cooper, with shorthand reporter Donald Flannery, arrived at headquarters and took a detailed confession from petitioner (Abst. 59-65, 144-150), which he refused to sign on February 1, 1960 at the State's Attorney's office "on the advice of counsel." (Abst. 213-214.)

While petitioner was being questioned on the night of January 30, 1960 at police headquarters, attorney Warren

Wolfson arrived and asked to see him (Abst. 15-16). He was told by Chief Flynn that petitioner was then being questioned, that he had been in the building only a short time, and that he could see petitioner when the police had finished their questioning (Abst. 120-121). Around 11:00 P. M. Wolfson saw petitioner through an open door in the Homicide Bureau and waved to him. Petitioner waved back to Wolfson (Abst. 171). Petitioner testified that after he was in custody an hour or so he saw his attorney, that his attorney made a motion to him, and that he interpreted the motion to mean that he shouldn't say anything to the police and that the lawyer wanted to talk to him (Abst. 54-55).

ARGUMENT.

I.

THE CONFESSION WAS VOLUNTARY.

We examine first the question of whether the *undisputed* facts in this record show petitioner's confession to be involuntary or coerced. This Court has said that a resolution of that question depends upon a "review of the circumstances under which the confession was made" and the conclusion is to be drawn from the "*totality* of this course of [police] conduct." (*Payne* v. *Arkansas*, 356 U. S. 560, 562-567.) The Supreme Court of Illinois is in agreement:

> "The question of whether a confession is voluntary depends upon the circumstances under which it was taken and no single factor is determinative. Thus, in *People* v. *Hall*, 413 Ill. 615, 624, we said: 'The effect of detention and questioning in coercing a confession, it seems to us, would vary in every instance, depending upon the place and length of time, the manner and extent of the questioning, and primarily upon the individual being questioned. Age, education, experience and emotional characteristics could make questioning coercive in one case, innocuous in another.' * * * The basic inquiry is whether or not the confessions in question were voluntary. The determination of this question depends not upon any one factor, but upon the totality of all the relevant circumstances." *People* v. *Nemke*, 23 Ill. 2d 591, 599-600.

When the allegations of promises of immunity and persuasion by Officer Montejano are put aside as disputed and disbelieved, both by the trial court and the Supreme Court of Illinois, it is clear that there is not a shred of evidence in this record to support the claim of involuntariness. The following factors are relevant.

A.

Age.

In this case petitioner was 22 years of age at the time of his arrest and confession. He was two years older than the defendant in *Cicenia* v. *LaGay*, 357 U. S. 504 where this Court held the confession voluntary, and considerably older than defendants in previous cases where this Court has overturned confessions as involuntary largely because of the tender age of the person being interrogated. Compare *Haley* v. *Ohio*, 332 U. S. 596 (age 15) and *Gallegos* v. *Colorado*, ... U. S. ....., 8 L. Ed. 2d 325 (age 14). This factor, therefore, does not contribute to any showing of coercion. *Thomas* v. *Arizona*, 356 U. S. 390, 401.

B.

Education.

The record in this case is silent concerning the extent of petitioner's formal education. The trial judge, however, made this specific finding which was relied upon by the Supreme Court of Illinois in its determination that the confession was voluntary:

> "I was impressed with this defendant's intelligence . . . he certainly is not ignorant by a long stretch of the imagination. He is pretty keen. . . ." (Abst. 73.)

C.

Maturity and Emotional Characteristics.

The record is largely devoid of any evidence on this point, but we note that petitioner was married and the father of a child (Abst. 179). Heavy reliance is placed in the Petition on evidence that when petitioner was questioned by Lieutenant Flynn he was "upset, nervous and

had circles under his eyes." (Pet. 8.) Flynn testified, however, that when he asked petitioner *why* he "appeared to be so nervous and agitated" petitioner told him that he had not slept well in over a week *because* of his part in the Valtierra killing (Abst. 102). This testimony confirms an important point made recently by the Supreme Court of New Jersey. In *State* v. *Smith,* 161 A. 2d 520, 546, that court said:

> "An interrogation, no matter how conscientiously conducted, is naturally bound to be a tense occasion and to evoke apprehension, nervousness and a sense of pressure, no matter what the situation, which will be heightened in a person who knows he is guilty by consciousness of guilt and fear of the legal penalty. It must be recognized that it is not this kind of normal stress, fear and pressure which can make the questioning unfair and a confession involuntary."

D.

Physical Treatment.

There is no claim in this case that petitioner was, at any time, abused or mistreated in any manner while in police custody.

E.

Length and Manner of Interrogation.

Petitioner was arrested at 8:30 or 9:00 P.M. in the evening. He orally confessed to Deputy Chief Flynn at about 10:15 P.M. and repeated his confession in greater detail to an Assistant State's Attorney and shorthand reporter at about 11:30 P.M. Although the questioning is characterized as being of the "relay" type (Pet. 9)—apparently in the hope of evoking memories of the kind of conduct condemned in *Ashcraft* v. *Tennessee,* 322 U. S. 143 and *Haley* v. *Ohio,* 332 U. S. 596—it is clear that the questioning

here was nothing of the sort and that the use of the word "relay" is a loose, and quite impermissible, translation of the admitted fact that petitioner was questioned by more than one police officer.

It is also apparent that when judged by the standards of past confession cases in this Court (*E.g. Spano* v. *New York*, 360 U. S. 315; *Ashcraft* v. *Tennessee*, 322 U. S. 143) the length of the interrogation which produced the confession here was remarkably short—something under two hours. This fact confirms the idea that the confession was, in the last analysis, provoked by the police custody of DiGerlando, his accusation against petitioner ("It seems apparent that the confrontation with DiGerlando precipitated the confession." *People* v. *Escobedo*, 190 N. E. 2d 825, 830), and petitioner's own sense of guilt; that the police were, in this instance, "midwife to a declaration naturally born of remorse, or relief, or desperation, or calculation." (*Culombe* v. *Connecticut*, 367 U. S. 568, 576.) Moreover, the record in this case shows that petitioner had been some 15 hours in police custody just ten days before, and that he did not confess during this period of detention though he had been interrogated. The length and manner of questioning in this case, therefore, could not have contributed to any coercion of petitioner's confession.

F.

The Legality of Arrest and Detention.

Petitioner's arrest on January 30, 1960 was lawful. Benedict DiGerlando, who was then in custody, had accused him of the murder about an hour previously and the arresting officers were aware of this fact. Since it was undisputed that a murder had been committed, DiGerlando's accusation furnished "reasonable ground for believing" that

petitioner was involved (See Ch. 38, § 657 Ill. Rev. Stat., 1959).

Secondly, it cannot be said that detention from 8:30 or 9:00 P.M. to 10:15 or 11:30 P.M. on Friday night—the period of time during which petitioner confessed both orally and in writing—was unlawful or in violation of the Illinois statute which provides that a person arrested without warrant shall be taken "without unnecessary delay" before the nearest magistrate (Ch. 38, § 660 Ill. Rev. Stat., 1959). Petitioner had been taken into custody upon the accusation of a man who was, along with the wife of the murdered Valtierra, being questioned by the same officers at the same time. The police here were "trying to solve a crime, or even to absolve a suspect" (*Spano* v. *New York*, 360 U. S. 315, 323). It is clear that the Supreme Court of Illinois would not hold the detention here to be in violation of the "without unnecessary delay" statute. (*People* v. *Jackson*, 23 Ill. 2d 274; *People* v. *Stacey*, 25 Ill. 2d 258.) Neither illegal arrest nor illegal detention was responsible, therefore, for defendant's confession.

G.

The Failure to Warn of Constitutional Rights.

In this case the police did not tell defendant of his right to keep silent while in police custody before obtaining his confession. Prior to his arrest on January 30, however, and following a 15 hour period of detention on January 20, petitioner had been explicitly told by a lawyer whom he consulted that if he was arrested to tell the police that he could make no statement without the advice of his counsel. This evidence fortifies the conclusion of the Supreme Court of Illinois that his confession did not result from ignorance of the privilege against self-incrimination. *People* v. *Escobedo*, 190 N. E. 2d 825, 830.

H.

The Violation of Right to Counsel Statutes.

The claim is made that certain Illinois statutes relating to the right to counsel were violated by the police in their refusal to permit Attorney Wolfson to see petitioner prior to the completion of questioning (Pet. 6).[2] As we read the opinion of the court below, however, it is not that clear that the police conduct under examination here necessarily violated the statutes. The court said:

> "These statutes[3] show a legislative policy against the police or other public officers insulating a person from his attorney, but it does not follow that the legislature intended that the statutes operate to insulate the person from the police or other public officials." *People* v. *Escobedo*, 190 N. E. 2d 825, 831.

It has not been authoritatively determined, therefore, that the police conduct violated the statutes.

I.

The Denial of Counsel.

The denial of counsel during police questioning is a factor to be considered in determining whether, under the totality of the circumstances, a confession was coerced. (*Crooker* v. *California*, 357 U. S. 433, 437-438; *Haley* v. *Ohio*, 332 U. S. 596; *People* v. *Nemke*, 23 Ill. 2d 591.) We believe that this record is far stronger than that in either *Crooker* or *Cicenia* in demonstrating that lack of counsel during questioning did not contribute to an involuntary statement.

First, in this case petitioner had been released on January 20 after 15 hours of police detention, *during which he*

2. Ch. 38, § 477 Ill. Rev. Stat. (1959); Ch. 38 § 449.1 Ill. Rev. Stat. (1959).

3. Transferred in 1961 to Ch. 38, § 736c and § 736b respectively.

did not confess, through the efforts of his counsel in obtaining a writ of habeas corpus. It would be unrealistic indeed, to assume that after only two hours of detention on January 30, petitioner felt beyond the help of his counsel to obtain his release despite the fact that he knew his counsel was not allowed to see him shortly after his arrest on that night.

Second, according to the testimony of his counsel petitioner conferred with him daily after his first arrest. It is entirely reasonable to presume that during these consultations counsel gave petitioner appropriate advice dealing with police custody.

Third, petitioner himself testified that his counsel had told him to refuse to answer police questions—to tell the police, if he was arrested again, that he was sorry but that he could not answer until he "had the advice of my lawyer." (Abst. 42.)

Fourth, petitioner interpreted a wave or motion to him by his counsel at police headquarters on the night in question to mean that he should not speak to the police and that his counsel wanted to see him (Abst. 54-55).

Those who would bar the use of any confession obtained after a denial of counsel apparently predicate their view upon the idea that the presence of counsel may prevent coercive interrogation and that counsel would certainly inform the prisoner of his privilege against self-incrimination (*Crooker* v. *California*, 357 U. S. 433, 441, 443, *dissenting opinion*; *Culombe* v. *Connecticut*, 367 U. S. 568, 637, 639-640, *concurring opinion*). Under this record, with no evidence of coercion, and clear evidence of knowledge on the part of petitioner of his right to keep silent, the denial of counsel could not have contributed to an involuntary confession.

This discussion, perhaps more extended than the ques-

tion warrants, shows that those circumstances usually associated with confessions which may properly be called coerced because they were obtained under circumstances which exceeded the civilized standards set by this Court in its enforcement of the Fourteenth Amendment are simply not present in this case. The Supreme Court of Illinois found "no reason for disturbing the trial court's finding that the confession was voluntary" (*People* v. *Escobedo*, 190 N. E. 2d 825, 827) and we submit that this decision was correct.

II.

THE HOLDINGS OF THIS COURT IN CROOKER AND CICENIA SHOULD NOT BE RECONSIDERED.

The Supreme Court of Illinois held:

> "The exclusion of a voluntary confession made outside the presence of counsel or the preclusion of effective interrogation by the presence of counsel is a high price to pay for whatever deterrent effect the presence of counsel would have on police abuses. If the police abuse their right to interrogate, the confession will be excluded. * * * Having given due weight to the various considerations involved, we are of the opinion that the right of a person in custody to see and consult with his attorney does not deprive the police of their right to a reasonable opportunity to interrogate outside the presence of counsel." *People* v. *Escobedo*, 190 N. E. 2d 825, 829, 831.

There is no dispute that this holding was correct under the principles announced by this Court in *Crooker* v. *California*, 357 U. S. 433 and *Cicenia* v. *LaGay*, 357 U. S. 504. Petitioner, however, requests the reconsideration of those decisions. We believe they should not be reconsidered for several reasons.

First, the record in this case is not the proper vehicle for such a reconsideration. For the reasons discussed in

Point I(I) above, petitioner was not without the effective assistance of counsel at the police station even though counsel was denied access to him during questioning. He had been released from previous custody through the efforts of his attorney. He had conferred daily with his attorney between January 20 and January 30, 1960, and during the latter part of that period he was given the specific admonition that if arrested again he was to make no statement to the police. He was armed with this advice when arrested on January 30, 1960 and he repeated this advice to the police during questioning. He glimpsed his attorney through an open door during the questioning period and interpreted a gesture or motion made by the attorney as meaning that his previously given advice was still in effect.

Under these circumstances, petitioner had the substance of the assistance of counsel during the period of police custody though the form may have been lacking. Since any *per se* exclusionary rule, which could be the only result of an opinion of this Court overruling *Crooker* and *Cicenia*, would necessarily apply to every person in police custody henceforth, for any length of time, whether young or old, rich or indigent, those who have a phalanx of lawyers pounding at the precinct door and those who have never dealt with an attorney in all their lives, and since such an opinion would produce a most devastating impact upon the ability of the police to solve some of the most serious, difficult and brutal crimes known to our society, we deem this case a most inappropriate one for any reconsideration of the rule announced in those opinions.

Second, it is implied in the Petition that the opinion of this Court in *Gideon* v. *Wainwright*, 370 U. S. 908, overruling *Betts* v. *Brady*, 316 U. S. 455, compels the reconsideration of *Crooker* and *Cicenia* (Pet. 7). The majority opinion in *Crooker*, however, anticipated this argument when it said:

> "But those decisions [*Betts* v. *Brady*] involve another problem, trial and conviction of the accused without counsel after state refusal to appoint counsel for him. What due process requires in one situation may not be required in another, and this, of course, because the least change of circumstances may provide or eliminate fundamental fairness. The ruling here that due process does not always require immediate honoring of a request to obtain one's own counsel in the hours after arrest, hardly means that the same concept of fundamental fairness does not require state appointment of counsel before an accused is put to trial, convicted and sentenced to death." *Crooker* v. *California*, 357 U. S. 433, 441 ft. 6.

The right of an accused to counsel in a capital case which existed at the time of the *Crooker* decision has not been broadened by the opinion of this Court in *Gideon* v. *Wainwright*, 370 U. S. 908. Since the result of that opinion is merely to extend the right of counsel *at the trial* to all felony cases, it furnishes no persuasive rationale for the reconsideration of *Crooker*.

Finally, we believe the reasons which led this court in *Crooker* to refuse to adopt an exclusionary rule based solely upon denial of counsel are as valid today as they were then. To say that the announcement of such a rule would have a "devastating effect on enforcement of criminal law" (*Crooker* v. *California*, 357 U. S. 433, 441) and that the "adoption of petitioner's position would constrict state police activities in a manner that in many instances might impair their ability to solve difficult cases" (*Cicenia* v. *LaGay*, 357 U. S. 504, 509) is not just the protective or fearful cry of the public prosecutor. Such a view commanded the respect of a majority of this Court in 1958. It has been reinforced by the views of those with long and fruitful experience in the field of criminal interrogation.[4] It has

4. Inbau and Reid, *Criminal Interrogation and Confessions*, pp. 204-209 (Williams and Wilkins Co. 1962).

been accepted by distinguished judges of the state courts whose opinions in other areas of the law have long demonstrated their jealous and abiding concern for the rights of those accused of criminal offenses.[5]

One would suppose that petitioner would point out to this Court those instances in which the rule of *Crooker* and *Cicenia* has gone awry since it was promulgated; those cases in which the rule has failed to protect the rights of a defendant. The Petition for Certiorari is silent on this score.

We take pride in the fact that since the opinion of this Court in *Griffin* v. *Illinois*, 351 U: S. 12, no state has done more to advance the rights of the indigent defendant, particularly in relation to the constitutional rights to counsel. Long before the decision in *Gideon* v. *Wainwright*, 370 U. S. 908, Illinois extended the right to counsel to every defendant in a felony case. Beginning on January 1, 1964 the right is extended beyond *Gideon* to misdemeanor cases.[6] And a canvass of the decisions of the Supreme Court of Illinois since *Griffin* will readily demonstrate that a majority of all criminal appeals taken in the State of Illinois today are those in which the defendant proceeds upon a free transcript with the services of appointed counsel who are, for the most part, young, and who are, always, competent and dedicated members of the bar of our state.[7]

We in Illinois believe in the constitutional right to counsel and we enforce it far beyond the minimum standards of federal due process. We do not believe that this right encompasses the total abolition of all interrogation of criminal suspects—fair as well as unfair. We do not believe,

5. See e.g., *People* v. *Garner*, 367 P. 2d 680, 693-699 (*concurring opinion* of Traynor, J.).

6. See § 113-3 (a), (b) of the Illinois Code of Criminal Procedure of 1963.

7. Petitioner's counsel in this case is an outstanding example.

therefore, that the opinions of this court in *Crooker* v. *California*, 357 U. S. 433 and *Cicenia* v. *LaGay*, 357 U. S. 504 should be reconsidered.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 615

DANNY ESCOBEDO,

Petitioner,

vs.

ILLINOIS.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE PETITIONER

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SUBJECT INDEX

CITATIONS

CASES:

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BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Supreme Court of Illinois (R. 125-134) is reported at 28 Ill. 2d 41; 190 N.E. 2d 825.

Jurisdiction

The judgment of the Supreme Court of Illinois was entered on May 27, 1963 (R. 125). The petition for writ of certiorari was filed July 1, 1963, and was granted on November 12, 1963 (R. 134-135). The jurisdiction of this Court rests on 28 U.S.C. 1257(3) since the right of the petitioner to due process of law under Amendment XIV to the Constitution of the United States was denied him below.

Questions Presented

1. Whether the totality of circumstances surrounding the obtaining of a pretrial court-reporter statement from the petitioner by the interrogating police rendered its subsequent admission into evidence against him at trial a denial of the due process of law guaranteed him by the Constitution of the United States, Amendment XIV.

2. Whether due process of law was denied petitioner by the admission against him at trial of a pre-trial court reporter statement which was obtained from petitioner in police custody only after his request to consult with his personal counsel, who was present at the police station demanding to consult with petitioner, was arbitrarily denied by the interrogating police.[1]

Constitutional Provision Involved

The applicable Constitutional provision involved is Amendment XIV, Section 1, which reads, in material part, as follows:

> " • • • nor shall any state deprive any person of life, liberty, or property, without due process of law; • • • "

Statement of the Case

Manuel Valtierra, petitioner's brother-in-law, was fatally shot before midnight on January 19, 1960. At 2:30 A.M. on January 20, 1960, petitioner and co-defendant Robert

[1] Respondent has formulated this second issue thusly:

> "II. Whether the denial of counsel during police interrogation, without regard to any other circumstances, bars the use of a confession obtained after such denial—should this Court reconsider its holdings in *Crooker* v. *California*, 357 U.S. 433 and *Cicenia* v. *LaGay*, 357 U.S. 504?" (p. 2, Brief for Respondent In Opposition)

Chan were arrested without a warrant and were confined and interrogated by the police until 5:00 P.M. that day (R. 16, 17, 83, 84) when they were released pursuant to a Writ of Habeas Corpus obtained by Mr. Warren Wolfson their attorney (R. 8, 79). Petitioner made no statements during this fifteen hour detention (R. 16).

Between 8:00 P.M. and 9:00 P.M. on January 30, 1960 petitioner and his sister Grace, widow of the deceased, were once again taken into custody by the Chicago Police and were removed to police headquarters (R. 17). They were not charged with any crime (R. 59, 80). Upon arrival at the police station, between 9:30 and 10:00 P.M. (R. 56, 80, 100) petitioner asked to see his lawyer (R. 17, 18, 85). His request was denied (R. 17). Moreover, at no time did petitioner have the opportunity to speak with anybody other than the agents of the State and his confrontation with a co-defendant prior to the time that his statement was ultimately obtained.

Warren Wolfson, petitioner's attorney, arrived at the police station at 9:30 P.M. (R. 56, 80). He demanded of the police that he be allowed to consult with his clients, petitioner and Bobby Chan, who had also been rearrested (R. 5, 80). He even pointed out the Illinois Statute giving him the right of private consultation (R. 5, 6). The police, however, told him he could not see petitioner because they had not completed questioning (R. 5, 61, 80). The denial by lower ranking officers was reinforced by the officer in charge, Acting Chief of Detectives, Lieutenant Flynn, who personally refused to allow Mr. Wolfson to visit his client (R. 6, 62, 80). This occurred prior to the time that Lieutenant Flynn ever spoke to petitioner (R. 57). Access to the petitioner was continually denied Mr. Wolfson and he ultimately left the station about 1:00 A.M. without ever having been permitted to interview or advise petitioner (R. 80). Although,

at one time when he was being refused access to petitioner, Mr. Wolfson did succeed in observing him across a room for a second or two. At that time, he made a waving motion to the petitioner and the petitioner waved back to him. No other contact was made between petitioner and his attorney (R. 80).

While petitioner's attorney was thus being treated, the interrogation by the police proceeded. Petitioner was a young man, age 22 years (R. 9, 79) of Mexican extraction (R. 10). There is no evidence of any past history of law violations or subjection to official interrogation. At no time during the entire night was he ever advised by any of his interrogators of his constitutional rights of counsel and freedom from self-incrimination (R. 19, 32). He was agitated and nervous as he had not slept well in over a week (R. 50). As to his appearance, the police lieutenant testified: "He was nervous, he had circles under his eyes and he was upset" (R. 55).

Petitioner had been arrested by Officers Gerald Sullivan, John Loftus and Frank Lassandrella (R. 29). These police officers, who attempted to convince him to make a statement while they were taking him to station (R. 30), took him to the station where he was turned over to the other police officers (R. 30), among them Officers Thomas Talty (R. 36, 37), Thomas O'Malley (R. 15, 37), Fred Montejano (R. 36) and Officer McNulty (R. 14). Deputy Chief of Detectives, Lieutenant Patrick J. Flynn, was in charge of the investigation (R. 14). These officers at various intervals during the evening, all interrogated petitioner (R. 85, 88).

According to the testimony of petitioner, Officer Fred Montejano spoke to him in Spanish (R. 19). Petitioner further testified that Montejano promised him that he would not be prosecuted if he made a statement, and further promised that he and his sister could go home and would be used

only as witnesses against one Benedict DiGerlando, the alleged assassin (R. 17). Montejano, petitioner also testified, spoke to him allegedly as a friend of his brother's and, stated: "Benny is Italian and there is no use in a Mexican going down for an Italian" (R. 19). This statement referred to the fact that DiGerlando had allegedly told the police that petitioner had done the shooting. All of these specific assertions were met with specific denials on the part of Officer Montejano (R. 9, 11, 12, 39).

Petitioner, at one point, saw that his attorney was at the police station (R. 18, 21, 86). However, he further saw that he and his attorney were being denied their right of consultation (R. 21, 86). Petitioner was confronted with a Benedict DiGerlando, also in custody, who accused petitioner of being the slayer (R. 26). Petitioner vehemently denied this accusation and told the police that DiGerlando was lying (R. 26).

After all of the foregoing transpired, petitioner dictated a court reporter statement to an assistant state's attorney who was called to the police station shortly before midnight (R. 31). However, he subsequently refused to sign the transcript of this statement stating that the police had not kept their promise and that the statement was not true (R. 88). Although he had been arrested on Saturday night, he was not arraigned until Monday morning (R. 102).

Co-defendant Chan also executed a pre-trial statement. Both petitioner and Chan made appropriate motions to suppress their statements prior to trial (R. 2).[2] The trial court sustained Chan's motion but denied petitioner's (R. 40, 41). The distinction that was relied upon by the trial

[2] Under Illinois law, the admissibility of a confession is solely for the judge (*Townsend* v. *Sain*, 372 U.S. 293, 83 S.Ct. 745). A motion to suppress brought prior to trial is an appropriate means of presenting this issue.

judge was that Chan gave his statement unaware that his attorney was in the building, but petitioner, having observed his attorney attempting, albeit unsuccessfully, to gain access to him, was not in the same situation (R. 41). At trial, petitioner's objection to the admission of his statement into evidence was likewise overruled (R. 74). He thereafter testified that the matters in the statement were not true (R. 88) and denied any complicity in the crime (R. 82, 83, 88).

The trial court allowed the statement into evidence, instructing the jury that it was competent evidence and that they had no right to disregard the statement as evidence (Bill of Exceptions, p. 632). The Supreme Court of Illinois determined that they could "find no reason for disturbing the trial court's finding that the confession was voluntary" (R. 128). The Illinois Supreme Court also rejected the petitioner's contention "that the confession is inadmissible because it was obtained after he had requested the assistance of counsel, which request was denied" (R. 128). Although recognizing that a "minority of the Supreme Court" (R. 128) would agree with petitioner's contention, the Court concluded that "[h]aving given due weight to the various considerations involved, we are of the opinion that the right of a person in custody to see and consult with his attorney does not deprive the police of their right to a reasonable opportunity to interrogate outside the presence of counsel" (R. 134).

Summary of Argument

A. The admission into evidence of petitioner's pre-trial statement was a denial of his right to due process guaranteed by the United States Constitution, Amendment XIV, because the totality of circumstances surrounding the obtaining of the statement by the interrogating police

deprived petitioner of his Constitutional rights. The circumstances consisted of a confluence of the following factors, each of which, either singly or in combination with others, have resulted in previous holdings that due process had been denied.

1. The following factors are uncontroverted in the record:

(a) The denial of the right of the petitioner to consult with his counsel who was present at the police station demanding to consult with him;[3]

(b) The failure to advise petitioner of his Constitutional rights, included the right of counsel and the right against self incrimination;[4]

(c) The incommunicado detention of petitioner, who was seen only by agents of the State;[5]

(d) The confrontation with a fellow suspect who accused petitioner of being the assassin;[6]

(e) The questioning by relays of police officers as well as an assistant State's Attorney;[7]

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[3] *Crooker* v. *California*, 357 U.S. 433, 78 S.Ct. 1287 (1958); *Cicenia* v. *LaGay*, 357 U.S. 504, 78 S.Ct. 1297 (1958); *Spano* v. *New York*, 360 U.S. 315, 79 S.Ct. 1202 (1959); *Culombe* v. *Connecticut*, 367 U.S. 568, 81 S.Ct. 1860 (1961).

[4] *Gallegos* v. *Colorado*, 370 U.S. 49, 82 S.Ct. 1209 (1962); *Griffith* v. *Rhay*, 282 F.2d 711 (C.C.A. 9, 1960), cert. den., 364 U.S. 941 (1961); *Payne* v. *Arkansas*, 356 U.S. 569, 78 S.Ct. 844 (1958); *Watts* v. *Indiana*, 338 U.S. 49, 69 S.Ct. 1347 (1949).

[5] *Spano* v. *New York*, fn. 3 supra; *Culombe* v. *Connecticut*, fn. 3 supra; *Haynes* v. *Washington*, 373 U.S. 503, 83 S.Ct. 1336 (1963); *Payne* v. *Arkansas*, fn. 4 supra; *Watts* v. *Indiana*, fn. 4 supra; *Reck* v. *Pate*, 367 U.S. 433, 81 S.Ct. 1541 (1961).

[6] *Bram* v. *United States*, 168 U.S. 532, 18 S.Ct. 183 (1897).

[7] *Spano* v. *New York*, fn. 3, supra; *Watts* v. *Indiana*, fn. 4 supra.

(f) The illegal arrest of petitioner in contravention of two distinct state statutes;[8]

(g) The youthfulness, inexperience, minority group extraction, and upset emotional state of the petitioner;[9]

2. The following clearly coercive[10] factors are testified to by petitioner although they are controverted by the testimony of a police officer:

(a) A promise of immunity from prosecution in return for the statement;

(b) The deception practiced by the police who told petitioner they only wanted a statement for use against another prisoner;

(c) The threat to confine petitioner's sister unless petitioner gave a statement coupled with the promised release of the sister if petitioner cooperated.

When viewed in light of the totality of all these circumstances it is clear that the resulting statement was obtained in contravention of petitioner's Constitutional rights and its admission into evidence resulted in the denial of due process to the petitioner.

B. Wholly apart from the many other factors present, the unlawful denial of the request of petitioner to consult with his counsel, who was present at the police station demanding access to petitioner, rendered his subsequent statement inadmissible in evidence against him at trial. The

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[8] *People* v. *Frugoli*, 334 Ill. 324, 166 N.E. 129 (1929); cf.: *Wong Sun* v. *United States*, 371 U.S. 471, 83 S.Ct. 407 (1963).

[9] *Gallegos* v. *Colorado*, fn. 4 supra; *Spano* v. *New York*, fn. 3 supra; *Haley* v. *Ohio*, 332 U.S. 596, 68 S.Ct. 302; *Fikes* v. *Alabama*, 352 U.S. 191, 77 S.Ct. 281; *Culombe* v. *Connecticut*, fn. 3 supra.

[10] *Culombe* v. *Connecticut*, fn. 3 supra; *Lynum* v. *Illinois*, 372 U.S. 528, 83 S.Ct. 917 (1963).

right to counsel, if it is to have any efficacy at all, must obtain when the need for the advice of counsel is crucial. Nowhere is the necessity for the advice of counsel more crucial than where the police, either pursuant to correct legal procedures or in contravention of such, have a suspect under their absolute control in a situation where the result of such an interrogation can render any subsequent assistance of counsel wholly illusory. If the police, through the device of postponing a suspect's opportunity to consult with his attorney, can obtain a statement from the suspect with no external protections except their own self-restraint, then the suspect's rights to be free from testimonial self-incrimination and to be rendered the assistance of counsel are valueless. Especially is this so in the case at bar where the advice of counsel would have precluded the eliciting of the statement of petitioner upon which his conviction was solely based. As the New York Court of Appeals has recently stated:

> "* * * we condemn continued incommunicado interrogation of an accused after he or the lawyer retained by him or his family has requested that they be allowed to confer together. And, it necessarily follows, if such a request is refused and a confession thereafter obtained, its subsequent use not only denies the accused the effective assistance of counsel but also * * * contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime." (*People* v. *Donovan*, 1963, 13 N.Y. 2d 148, 193 N.E. 2d 628 at 630.)

ARGUMENT

I.

The Totality of Attendant Circumstances Surrounding the Obtaining of Petitioner's Pretrial Statement Disclosed That the Statement Was Not Made Freely, Voluntarily, and Without Compulsion or Inducement of Any Sort But, Rather, Was the Product of the Combination of Many Improper Pressures Which Caused Petitioner's Will to Be Overborne Rendering the Subsequent Statement Inadmissible Against Him.

The factual complex of this case raises the issue of the permissible limits to which law enforcement officers may go before they transgress the inalienable rights to due process guaranteed to all accused by the Fourteenth Amendment of the United States Constitution. It is well recognized that a statement of an accused obtained while in police custody will be inadmissible in evidence if the statement has not been elicited freely, voluntarily, and without compulsion or inducement of any sort. (*Haynes* v. *Washington*, 373 U.S. 503, 83 S.Ct. 1336 at 1343, and cases cited therein (1963).) The substance of this test of "voluntariness" has come to be measured by an examination of all the attendant circumstances (*Haynes* v. *Washington*, supra, 83 S.Ct. at 1343, especially footnote 10 therein) and if "constitutionally impermissible methods" [11] have been used to assist in ob-

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[11] The source of this phrase is in Mr. Justice Frankfurter's opinion, speaking for the Court in *Rogers* v. *Richmond*, 365 U.S. 534, 541, 81 S.Ct. 735, 740 (1961):

> "Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed. Despite such verification, confessions were found to be the product of constitutionally impermissible methods in their

taining it, these factors weigh heavily on the question of the admissibility of the statement into evidence.

In the case at bar, when petitioner was arrested by the police and taken to police headquarters, he entered the interrogation process intent on making no statement.[12] Yet at the end of the interrogation process, and in contravention of the prior instruction of counsel (R. 20) a statement was obtained. It is inescapable that the statement that resulted was the product of the interplay of various improper pressures, and its admission into evidence resulted in a denial of petitioner's right to due process of law.

An analysis of the circumstances attendant upon the obtaining of this court reporter statement reveals a multitude of improper factors that have, in prior cases, induced this Court to hold other statements inadmissible. These will be discussed seriatim.

Uncontroverted Facts

A. Petitioner Was Denied His Right to Consult With His Attorney Who, in Fact, Was Present at the Police Station Demanding to Consult With Him.

In *Crooker* v. *California*, 357 U.S. 433, 78 S.Ct. 1287 (1958), and *Cicenia* v. *LaGay*, 357 U.S. 504, 78 S.Ct. 1297 (1958), this Court recognized that an accused's lack of coun-

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inducement. Since a defendant had been subjected to pressures to which, under our accusatorial system, an accused should not be subjected, we were constrained to find that the procedures leading to his conviction had failed to afford him that due process of law which the Fourteenth Amendment guarantees."

[12] Indeed he had refused to make any statement during a prior period of police interrogation which lasted for fifteen hours and which was terminated only after his attorney had secured his release on a Writ of Habeas Corpus (R. 16).

sel must be considered as "one pertinent element in determining from all the circumstances whether a conviction was attended by fundamental unfairness" (357 U.S. at 509, 78 S.Ct. at 1300). This element has been recognized in many cases decided by this Court as a major, if not controlling,[13] factor in determining whether the standards of due process have been met. (See, e.g. *Gallegos* v. *Colorado*, 370 U.S. 49, 82 S.Ct. 1209 (1962) and *Haynes* v. *Washington*, 373 U.S. 503, 835 S.Ct. 1336 (1963).)[14]

In the instant case, the evil of the denial of the right of petitioner and his counsel to consult with each other is compounded by the fact that the police refused this right despite a positive state statute granting it.

Section 229 of the Division I of the Criminal Code (Ill. Rev. Stats. 1959, chap. 38, par. 477) provides:

> "All public officers, sheriffs, coroners, jailers, constables or other officers or persons having the custody of any person committed, imprisoned or restrained of his liberty for any alleged cause whatever, shall, except in cases of imminent danger of escape, admit any practicing attorney at law of this state, whom such person so restrained of his liberty may desire to see or consult, to see and consult such person so imprisoned, alone and in private, at the jail or other place of custody; * * *"

Moreover, an ancillary statute (Ill. Rev. Stats., 1959, chap. 38, par. 449.1) provides:

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[13] See *Crooker* v. *California*, 357 U.S. 433 at 441, et seq., dissenting opinion of Mr. Justice Douglas.

[14] See also *Culombe* v. *Connecticut*, 367 U.S. 568, 81 S.Ct. 1860 (1961); *Spano* v. *New York*, 360 U.S. 315, 79 S.Ct. 1202 (1959); *Reck* v. *Pate*, 367 U.S. 433, 81 S.Ct. 1541 (1961); *Rogers* v. *Richmond*, 365 U.S. 534, 81 S.Ct. 735 (1961); *Payne* v. *Arkansas*, 356 U.S. 560, 78 S.Ct. 844 (1958).

"* * * whoever shall, while holding another person in custody, deny the other person his right to consult and be advised by an attorney at law whether or not such person is charged with a crime, * * * shall be fined not less than $100 nor more than $1,000 or shall be imprisoned for not less than ten days nor more than six months, or both." [15]

Attorney Warren Wolfson had been retained by petitioner prior to his arrest (R. 79). Indeed, on the occasion of petitioner's prior 15 hour detention of January 20, 1960, Mr. Wolfson had succeeded in securing petitioner's release on a writ of habeas corpus (R. 79). As to what transpired on the night in question, Mr. Wolfson's testimony at trial reveals:

"* * * January 30th, 1960, I was still Danny Escobedo's lawyer. On that day I received a phone call and pursuant to that phone call I went to the Detective Bureau at 11th and State. The first person I talked to was the sergeant on duty at the Bureau Desk, Sergeant Pidgeon. I asked Sergeant Pidgeon for permission to speak to my client Danny Escobedo. I had been informed earlier by phone that he was in the Detective Bureau. Sergeant Pidgeon made a call to the Bureau lockup and informed me that the boy had been taken from the lockup to the Homicide Bureau. This was between 9:30 and 10:00 in the evening. Before I went anywhere, he called the Homicide Bureau and told them there was an attorney waiting to see Escobedo. He told me I could not see him. Then I went upstairs

[15] This and similar statutes have been cited by this court as examples of a "procedural safeguard against coercive police practices" (*Crooker* v. *California*, 357 U.S. 433, dissent of Douglas, J., at 488, footnote 4) cf.: *Culombe* v. *Connecticut*, 367 U.S. 568, footnote 29. However, it is manifest that the police, in many instances, pay no attention to these legislative commands.

to the Homicide Bureau. There were several Homicide Detectives around and I talked to them. I identified myself as Escobedo's attorney and asked permission to see him. They said I could not. At this time there had been no formal booking and Danny Escobedo had not been charged with a crime.[16] The police officer told me to see Chief Flynn who was on duty. I identified myself to Chief Flynn and asked permission to see my client. He said I could not. As to what time that was, I think it was approximately 11:00 o'clock. He said I couldn't see him because they hadn't completed questioning. As to whether I got an opportunity to see Danny Escobedo that night, for a second or two I spotted him in an office in the Homicide Bureau. The door was open and I could see through the office. As to whether I attempted to talk to him or say something to him, I waved to him and he waved back and then the door was closed, by one of the officers at Homicide. There were four or five officers milling around the Homicide Detail that night. As to whether I talked to Captain Flynn any later that day, I waited around for another hour to two and went back again and renewed my request to see my client. He again told me I could not. He did not tell me that he made an investigation and determined that I was not Danny Escobedo's lawyer. He never told me that. * * * I had conversation with every police officer I could find. I was told at Homicide that I couldn't see him and I would have to get a writ of habeas corpus. I left the Homicide Bureau and from the Detective Bureau at 11th and State at approximately 1:00 A.M. I had no opportunity to talk

[16] The practice of holding a suspect, without charge, for "investigation" has recently been characterized as "questionable" by this Court, speaking through Mr. Justice Goldberg in *Haynes* v. *Washington*, 83 S.Ct. 1336 at 1339, footnote 3, in which case the Spokane, Washington, police practiced the "small book" procedure.

to my client that night. I quoted to Captain Flynn the Section of the Criminal Code which allows an attorney the right to see his client. This is the Code where rights are given to a client in custody to talk to his lawyer" (R. 79-81).

Police Lieutenant Flynn's testimony is corroborative. He stated that about 9:30 P.M., before he even knew that petitioner was in the building, he was informed that there was an attorney in the building representing petitioner (R. 57). Lieutenant Flynn asked that the attorney be sent up to his office and he spoke to Mr. Wolfson at that time (R. 57). Lieutenant Flynn then advised petitioner's attorney that "if the man was in custody and if he was not in the process of being questioned or investigated then he would be allowed to see him" (R. 58). At that point petitioner was not charged with any crime. He was just "being investigated" (R. 59).

On redirect examination, Lieutenant Flynn once again summarized what had transpired. This colloquy is illuminating.

"Q. And just tell us what you said to him and what he said to you?

A. I determined that the man was in the building and he was being—he was under questioning relative to a homicide and I explained to him that the man had only been in the building a very short while and as soon as the officers had completed their questioning that he would be allowed to see him.

Q. And what, if anything, did he say to you then?

A. He started quoting some statute relative to his rights and demands as far as seeing his client.

Q. And then what did you say to him?

A. I went—that was the end of it.

Q. That was the end of the conversation?

A. Yes.

Q. Then where did you go and where did he go, if you know?

A. He walked out of the office. At this time I went over to the Homicide" (R. 61, 62).

Officer Gerald Sullivan's testimony also establishes the custom of the police to refuse to allow a suspect's attorney to consult with him. Officer Sullivan had been one of the police who had arrested petitioner (R. 29, 99). He was present at various times in the Detective Bureau. He testified that he saw Attorney Wolfson after Wolfson had been called to the office of the Chief [Flynn]. He was present when the conversation was carried on. The record recites:

"Q. Did Mr. Wolfson make a demand to see his clients, who are the defendant and another Robert Chan, at this time?

A. Yes, he did.

Q. Who did he make this demand to?

A. Deputy Chief of Detectives Patrick Flynn.

Q. Did Mr. Flynn answer this demand?

A. He said that when we were through interrogating, we were in the process of interrogating these men, that they had only been in a short time, when we finished talking to him he would be able to see his client.

Q. About what time was this?

A. That was around 10:30 P.M.

Q. And was any time limit set whereby the attorney could see his clients?

A. No, sir. We were in the process of interrogating" (R. 30, 31).

Petitioner testified that as soon as he arrived at the police station, he refused to talk until he had consulted with

his attorney (R. 17). The Illinois Supreme Court has also accepted this request for counsel by petitioner as being established in this case (R. 132). Accordingly the record uncontrovertedly demonstrates that petitioner had requested to consult with his attorney, and the attorney had demanded access to his client, and the requests of both were unlawfully refused prior to the time that petitioner made any oral admissions, let alone gave a court reporter statement.

The denial of counsel, alone, has as yet not been held by this Court to render a subsequent statement inadmissible.[17] (*Crooker* v. *California*, 357 U.S. 433, 78 S.Ct. 1287 (1958), *Cicenia* v. *LaGay*, 357 U.S. 504, 78 S.Ct. 1297 (1958).) However, in these two cases declining to so hold, the denial of counsel was the only factor present. The *Crooker* case involved the peculiar circumstance of an accused virtually able to be his own attorney, having completed college and a year of law school, including a course in criminal law. Additionally he was advised prior to his interrogation that he need not answer any questions. Thus, apart from the denial of counsel, there was no due process violation raised (357 U.S. at 438, 78 S.Ct. at 1291). Likewise, in the *Cicenia* case there was no claim of denial of due process apart from the fact of denial of counsel during interrogation.

However, in the instant case much more is presented than the bare absence of counsel. Such other factors, which distinguish the *Crooker* and *Cicenia* cases,[18] shall now be considered.

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[17] Although this Court has, in this case, granted certiorari to determine whether or not the *Crooker* and *Cicenia* cases should be reconsidered. It shall be hereinafter proposed that such fact, *co ipso*, should render the statement inadmissible. See *People* v. *Donovan*, 13 N.Y. 2d 148, 193 N.E. 2d 628 (1963).

[18] Such as was done in *Griffith* v. *Rhay*, fn. 4 supra.

B. Petitioner Was Not Advised of His Constitutional Rights.

In *Gallegos* v. *Colorado*, 370 U.S. 48, 82 S.Ct. 1209 (1962), this Court held that the failure to inform the accused of his rights had the same effect upon that accused as if he had no rights. It was there determined that advice as to his rights "from someone concerned with securing him those rights" would have put that accused "on a less unequal footing with his interrogators" (370 U.S. at 54, 82 S.Ct. at 1212). The confession of that accused was held to be inadmissible because no one had offered such advice. See also *Griffith* v. *Rhay*, 282 F.2d 711 (C.C.A. 9, 1960) cert. den. 364 U.S. 941 (1961).[19]

In *Watts* v. *Indiana*, 338 U.S. 49, 69 S.Ct. 1347 (1949), this Court, in pointing to a number of factors which vitiated the confession, included the fact that "the petitioner • • • was without friendly or professional aid and without advice as to his constitutional rights" (338 U.S. 49 at 53, 69 S.Ct.

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[19] In *Griffith* v. *Rhay*, the Court stated:

"In our opinion Griffith was so prejudiced by not having the advice of counsel on the afternoon of October 11, 1956. No one told him at that time that he did not have to submit to interrogation. There is no testimony that he had previously been given this information. Considering his youth (age 19) and background, it could not reasonably be inferred that Griffith understood that he had the right to remain silent.

"Had he been represented by an attorney on that occasion Griffith would have without doubt been advised that he need not talk. • • •

"Since Griffith had a right to the assistance of counsel on the afternoon of the interrogation, his failure to request such assistance has significance only if it amounted to a waiver of that right. • • •

"There is nothing in this record to indicate that Griffith knew that he had the right to the assistance of counsel on the afternoon in question. It follows that there is no support for a finding or conclusion that his failure to request counsel constituted a waiver of a known right" (282 F.2d at 717, 8).

1349). And in *Payne* v. *Arkansas*, 356 U.S. 560, 78 S.Ct. 844 (1958) one of the factors enumerated as bearing on the "totality" of circumstances was that Payne "(3) was not advised of his right to remain silent or his right to counsel" (356 U.S. at 569, 78 S.Ct. at 850).

In this case, it was the act of the police, in denying the attorney-client consultation, that caused the accused to be ignorant of his constitutional rights.

It has been suggested by the Illinois Supreme Court[20] that, having had access to his attorney at some time prior to his arrest, the petitioner in fact did know of his rights. However, the record demonstrates that petitioner's attorney had not explained these rights to him. Rather, all he had told petitioner was "to tell the officers in a nice way that I was sorry but that I could not talk to them until I had the advice of my lawyer" (R. 20). Thus, petitioner's attorney had not explained to petitioner the substance of all his various rights but had merely told petitioner what to do and say, but not why. And when petitioner did what his attorney had instructed and found it ineffective, he was left in a situation which was inherently coercive, for petitioner could well have believed that he was completely at the mercy of the police without hope of outside assistance.

Nevertheless, respondent has argued in its Brief in Opposition that "petitioner had the substance of the assistance of counsel during the period of police custody though the form may have been lacking" [21] because of petitioner's prior

[20] "While much is made of the circumstances that his request for counsel was not immediately (sic; Quaere—should this not be "ever"?) honored, the record shows that he had previously consulted with his attorney about the case and that he understood from a motion the lawyer made to him at the police station that he should not talk to the police" (R. 127).

[21] Brief For Respondent In Opposition, page 17.

conversations with his attorney. Assuming, *arguendo*, that this be so, it is just as effective a means of psychological coercion to arbitrarily deny a suspect a right he knows he has than not to tell him of his rights at all. A recent commentator has observed:

> "Even if the accused is informed or knows of his constitutional rights, his confession may still be attributable to other practices typically found in totalitarian countries. He may still be held incommunicado, be denied counsel, or be not given a prompt preliminary hearing. In seeing his rights callously disregarded, the accused may well despair of ever realizing the benefits of those rights or of a fair proceeding. Under the circumstances, standing alone before the awesome forces of the criminal law he may feel that the constitutional rights he knows of will not be made available to him * * * It seems clear that the benefits of constitutional rights are not effectuated merely by guaranteeing that the accused shall know of them—he must be also able to exercise them." (King, A New Constitutional Standard for Confessions, 8 Wayne L. Rev. 481 at 489.)

In the *Crooker* case,[22] the denial of counsel was held nonprejudicial because the accused knew of, and exercised, his constitutional rights. In the *Gallegos* case,[23] on the other hand, the lack of knowledge of constitutional rights rendered the confession inadmissible. In the instant case, the denial of counsel was accompanied by a failure to inform the petitioner of his rights (R. 19, 32). Such combination renders statements thereafter obtained inadmissible. (See *Griffith* v. *Rhay*, 282 F.2d 711.)

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[22] 357 U.S. 433, 73 S.Ct. 1287 (1958).

[23] 370 U.S. 49, 82 S.Ct. 1209 (1962).

C. The Incommunicado Detention of Petitioner, Who Was Seen Only by Agents of the State.

Once petitioner was arrested he was taken to the police station and was not allowed to consult with anyone until he gave a statement. By happenstance, his attorney observed him through an open door but, after one or two seconds, that door was closed by a policeman (R. 80). Officer Sullivan testified that there was no time limit set on the length of secret police interrogation. He also stated that the attorney was told that he wouldn't be admitted to his client until the police were finished (R. 30, 31).

Accordingly, the situation that existed was that the petitioner was arrested but was not "booked"; his attorney was not allowed to see him and the interrogation could continue as long as the police were not finished with the petitioner. The fact that the petitioner succumbed to the effect of the incommunicado detention, having no doubt that the police could keep him as long as they desired, does not detract from the coercive nature of the detention. Indeed, the fact that petitioner submitted within a few hours despite his inclination to the contrary merely buttresses the efficacy of this coercive practice. The vice of incommunicado detention,[24] coupled with the apparent power of the police

[24] It has recently been very persuasively argued that the McNabb-Mallory Rule (*U.S.* v. *McNabb*, 318 U.S. 322, 63 S.Ct. 698 (1943); *United States* v. *Mallory*, 354 U.S. 499, 77 S.Ct. 1356 (1957)) invalidating confessions obtained from an accused subsequent to arrest where there has been a delay in arraignment, has a Constitutional basis and, as a result of the cases of *Wong Sun* v. *United States*, fn. 8, supra, and *Mapp* v. *Ohio*, 367 U.S. 643, 81 S.Ct. 1684 (1961), applies to the various states under the Fourteenth Amendment Due Process Clause. See Broeder, *Wong Sun* v. *United States, A Study of Faith and Hope*, 42 Nebraska Law Review, 483 at 565-594 (1963). The Supreme Court of Michigan has adopted the rule (*People* v. *Hamilton*, 359 Mich. 410, 102 N.W. 2d 738). See also *Fikes* v. *Alabama*, 352 U.S. 191, 77 S.Ct. 281 (1957).

to perpetuate that condition at their desire, has been consistently condemned by this Court.[25]

D. The Confrontation With a Fellow Suspect Who Accused Petitioner of Being the Assassin.

The theory of the prosecution has never been that petitioner was the actual perpetrator of the homicide. The State's case had always been that petitioner's culpability rests on his being an accessory before the fact who asked another to do the actual slaying. Yet, while being held in custody, petitioner was told by several policemen that the State had evidence that petitioner was the slayer (R. 9, 17, 30, 38).[26] Upon vehemently denying his guilt, petitioner was confronted with one Benedict DiGerlando, another suspect. DiGerlando falsely accused petitioner of doing the shooting (R. 26).

This device,[27] one of many methods of psychological coercion, caused the petitioner to make the false statement

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[25] See for example, the following cases: *Spano* v. *New York*, fn. 3 supra; *Culombe* v. *Connecticut*, fn. 3 supra; *Haynes* v. *Washington*, fn. 5 supra; *Reck* v. *Pate*, fn. 5 supra; *Payne* v. *Arkansas*, fn. 4 supra; *Watts* v. *Indiana*, fn. 4 supra; *Ashcraft* v. *Tennessee*, 322 U.S. 143, 64 S.Ct. 921 (1944).

[26] Compare *Bram* v. *United States*, 168 U.S. 532, 18 S.Ct. 183 (1897). In *Bram* the statement of the fellow suspect was true. In this case, the accusatory statement of DiGerlando, the suspect, was false.

[27] The coercive operation of this device has been explained as follows:

> "It cannot be doubted that, placed in the position in which the accused was when the statement was made to him that the other suspected person had charged him with a crime, the result was to produce upon the mind that fear that, if he remained silent, it would be considered an admission of guilt, and therefore render certain his being committed for trial as the guilty person; and it cannot be conceived that the converse impression would not also have naturally arisen that, by denying, there was hope of removing the suspicion from himself. If this must have been the state of mind of one

suggested by Officer Montejano (R. 87), to wit: to clear himself by putting the blame on DiGerlando. The petitioner, not schooled in the law, could not know that by making such a false statement, ostensibly to remove false suspicion from himself, he was nonetheless implicating himself as an accessory.

It goes without saying that if petitioner had been allowed to consult with counsel, he would have been told that so long as DiGerlando's accusations were groundless, which they were, petitioner did not have to worry about them. And petitioner would surely have been told of the folly of attempting to clear himself of supposed suspicion by going along with a false story implicating another. In short, he would have been told of his right to remain silent and he would have been advised to exercise that right.[28]

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situated as was the prisoner when the confession was made, how, in reason, can it be said that the answer which he gave, and which was required by the situation, was wholly voluntary, and in no manner influenced by the force of hope or fear? To so conclude would be to deny the necessary relation of cause and effect. * * * To communicate to a person suspected of the commission of crime the fact that his co-suspect has stated that he has seen him commit the offense, to make this statement to him under circumstances which call imperatively for an admission or denial, and to accompany the communication with conduct which necessarily perturbs the mind and engenders confusion of thought, and then use the denial by the person so situated as a confession, because of the form in which the denial is made is not only to compel the reply, but to produce the confusion of words supposed to be found in it, and then use statements thus brought into being for the conviction of the Accused. A plainer violation as well of the letter as of the spirit and purpose of the constitutional immunity could scarcely be conceived of." (*Bram* v. *United States*, 168 U.S. 532, 18 S.Ct. 183 at 194-5 (1897).)

[28] "Had he been represented by an attorney on that occasion Griffith would without doubt have been advised that he need not talk. In view of his physical condition, the possible effect of the demerol, and the seriousness of the charge and penalty, such an attorney would probably also have advised him to

E. The Questioning, by Relays of Police and the State's Attorney.

As set forth in the case of *Spano* v. *New York*, 360 U.S. 315, 79 S.Ct. 1202 (1959), one of the elements there present that rendered that confession inadmissible was that "[h]e was subjected to questioning not by a few men but by many" (360 U.S. at 322, 79 S.Ct. at 1206, 7).[29] Likewise, in the case at bar petitioner was subjected to questioning by police officers of various ranks up to the acting Chief of Detectives and thereafter by an assistant State's Attorney. He had been picked up by three police officers. He was turned over to others at the station who questioned him at various times. Finally he was interrogated by Chief Flynn, after Flynn had told his attorney that he couldn't see petitioner. Ultimately the statement which was received in evidence was obtained, not as a narrative statement, but in a question and answer form (Bill of Exceptions, pp. 328-340) with an assistant state's attorney asking the questions (compare *Spano* v. *New York*, 360 U.S. at 322, 79 S.Ct. at 1206 (1959)).

The State showed no qualms about having one of its own attorneys interview the petitioner despite having refused to allow petitioner's own counsel the same privilege. (See *People* v. *Donovan*, 13 N.Y. 2d 148, 193 N.E. 2d 628,

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refuse to talk. [dropping to footnote] As Justice Jackson said, concurring in *Watts* v. *State of Indiana*, 338 U.S. 49, 58, 69 S.Ct. 1347, 1357, 1358, 93 L.Ed. 1801:

'Under this conception of criminal procedure, any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to the police under any circumstances.'" (*Griffith* v. *Rhay*, 282 F.2d 711, 717 (1960).)

[29] See also *Watts* v. *Indiana*, fn. 4 supra; *Ashcraft* v. *Tennessee*, fn. 25 supra.

629 (1963).)[30] The police showed their power to petitioner by having him exposed to a vast number of officers and, further, by allowing him to witness his own attorney's futile efforts to see him. A statement that follows such a display of might cannot be allowed into evidence as having been received "without coercion of any sort."

F. The Illegal Arrest of Petitioner.

Two distinct statutes bear on the illegality of petitioner's arrest which precipitated his pre-trial statement. The Illinois Habeas Corpus Statute (Ill. Rev. Stat., 1959, Ch. 65, § 26) provides in material part:

> "No person who has been discharged by order of the court or judge, on a habeas corpus, shall be again imprisoned, restrained or kept in custody for the same cause, * * * "

The testimony of petitioner's attorney is uncontroverted that, on January 20, 1960, he had secured petitioner's release from custody on a writ of habeas corpus (R. 8, 79). The Illinois Supreme Court so found (R. 131). Yet on the night in question, petitioner was once again picked up and placed in custody, not charged with an offense, but merely "being investigated" (R. 59). This clearly was an unlawful arrest and confinement.

At the time of petitioner's arrest, Illinois also had another statute[31] (Ill. Rev. Stats. 1959, Ch. 38, § 379) which provided, in material part:

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[30] The ethical impropriety of this procedure is forcefully discussed by Professor Broeder in his recent article, *Wong Sun* v. *United States—A Study In Faith and Hope*, 42 Nebraska Law Review, 483 at 599-604 (1963).

[31] Referred to by this Court in *Culombe* v. *Connecticut*, 367 U.S. 568 at 586 (footnote 28), 81 S.Ct. 1860, 1870 (1961).

> "If two or more persons . . . shall imprison another . . . for the purpose of obtaining a confession . . . they shall be imprisoned in a penitentiary not less than for one year."

This statute, making the acts of the police a felony, was also manifestly violated to petitioner's detriment. It is clear that the sole purpose of petitioner's arrest was to confine him "for investigation". He was not charged with a crime but was being interrogated as to his supposed complicity in his brother-in-law's death. The State cannot deny that petitioner was imprisoned for the purpose of obtaining a confession, for that indeed is what happened.

The Illinois Supreme Court, back in 1929, had stated:

> "*It is not the right of policemen* anywhere in this State *to arrest men supposed to be guilty of* or charged with *crime and confine them* in a police station or other such place *and deprive them of the lawful right* of bail and the right *of counsel* * * * *by hiding them* * * * *for the unlawful* and criminal *purpose* of extorting a confession or *of obtaining a confession by any means* in such stations or places." (*People* v. *Frugoli*, 334 Ill. 324. 333, 166 N.E. 129, emphasis added.)

Unfortunately, the Illinois Supreme Court has failed to recognize this salutary holding in the present case. Nevertheless, for their violation of these two statutes, and for their confinement without charge for "investigation", the police arrest of petitioner was clearly illegal. The statement of petitioner, being the fruit of his unlawful arrest cannot be admitted into evidence.[32] *Wong Sun* v. *United States*,

[32] "Verbal evidence which derives so immediately from * * * an unauthorized arrest * * * is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion" (83 S.Ct. at 416).

370 U.S. 471, 83 S.Ct. 407 (1963). Although that was a case arising in the Federal courts, the language of this Court's decision compels the conclusion that a like standard applies to state prosecutions under the Fourteenth Amendment.[33] In the instant case, the statement of the petitioner is surely the "fruit" of petitioner's unlawful arrest and, under the *Wong Sun* decision, is inadmissible against petitioner.

Moreover, the illegal nature of petitioner's detention distinguishes the *Crooker* and *Cicenia* cases and, in combination with the denial of counsel and other factors here present, is an additional circumstance resulting in a denial of petitioner's right to due process.

G. The Youthfulness, Inexperience, Minority Group Extraction, and Upset Emotional State of the Petitioner.

In *Culombe* v. *Connecticut*, 367 U.S. 568, 81 S.Ct. 1860 (1961), Mr. Justice Frankfurter articulated the fact that voluntariness, to a great extent, depends upon the makeup of the person against whom the police pressures are brought to bear.

In *Crooker* v. *California*,[34] the denial of counsel was held nonprejudicial because of the background of the accused. In contrast, in *Gallegos* v. *Colorado*,[35] the mere failure to advise that accused of his rights,[36] absent any other elements of coercion, rendered his statement inadmissible be-

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[33] See Professor Broeder's excellent analysis of the application of Wong Sun rule to the States: Broeder, *Wong Sun* v. *United States. A Study in Faith and Hope*, 42 Nebraska Law Review, 483 at 557-564 (1963). Cf. *Mapp* v. *Ohio*, 367 U.S. 643, 81 S.Ct. 1684 (1961).

[34] 357 U.S. 433, 78 S.Ct. 1287 (1958).

[35] 370 U.S. 49, 82 S.Ct. 1209 (1962).

[36] See also *Griffith* v. *Rhay*, 282 F.2d 711 (1960).

cause of his age and experience.[37] Petitioner here was only 22 years of age (R. 19). He was of Mexican extraction (R. 10). There is no evidence of any past history of law violations or subjection to official interrogation. Compare *Spano* v. *New York*, 360 U.S. 315, 79 S.Ct. 1202 (1959). The denial of the assistance of counsel certainly had the desired effect of eliciting a pre-trial statement in this case whereas in *Crooker* and *Cicenia* there was no contention of any causal relationship between those deprivations and the subsequent confessions.

Controverted Facts

In addition to the foregoing factors, all of which are uncontroverted in the record, petitioner testified to various other matters which bear on the voluntariness of his statement. It has been observed that one of the inherent vices of incommunicado detention is that the suspect's version of the events that transpired therein cannot be corroborated and will be met by the contrary testimony of the police. Mr. Justice Black's dissenting remarks of *In re Groban*, 352 U.S. 330, 340-343, 77 S.Ct. 510, 517, 518 (1957), have been many times repeated:

> "The witness has no effective way to challenge his interrogator's testimony as to what was said and done at the secret inquisition. The officer's version frequently may reflect an inaccurate understanding of an accused's statements or, on occasion, may be deliberately distorted or falsified. While the accused may protest against these misrepresentations, his protestations will normally be in vain. This is particularly true when the officer is accompanied by several of his as-

[37] See also *Haley* v. *Ohio*, 332 U.S. 596, 68 S.Ct. 302 (1948); *Fikes* v. *Alabama*, 352 U.S. 191, 77 S.Ct. 281 (1957).

sistants and they all vouch for his story. But when the public, or even the suspect's counsel, is present the hazards to the suspect from the officer's misunderstanding or twisting of his statements or conduct are greatly reduced.

The presence of legal counsel or any person who is not an executive officer bent on enforcing the law provides still another protection to the witness. Behind closed doors he can be coerced, tricked or confused by officers into making statements which may be untrue or may hide the truth by creating misleading impressions. While the witness is in the custody of the interrogators, as a practical matter he is subject to their uncontrolled will. * * * Nothing would be better calculated to prevent misuse of official power in dealing with a witness or suspect than the scrutiny of his lawyer or friends or even of disinterested bystanders."

In the case at bar petitioner stated, under oath, that he had been offered a promise of immunity in return for a statement; that he had been told by police that they only wanted his statement for use against another, and that the police used the device of promising to release his sister if he cooperated (R. 19). Of course, the police officer, Montejano, denied making these statements (R. 9, 11, 12, 39).[38]

In the Brief for Respondent in Opposition to the granting of the Writ of Certiorari, the respondent argued that this

[38] "Relevant here also is the overwhelming evidence that police officers who are guilty of unconstitutional or other improper behavior often if not usually commit perjury when asked about it on the stand, or, indeed, anywhere else. * * * (C)itation of authorities * * * can be found in Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 Minn. Law Review 1083, particularly at 1177 et seq. (1959)." Broeder, *Wong Sun* v. *United States: A Study in Faith and Hope*, 42 Neb. L. Rev. 483 at 522 (1963).

Court is bound by the factual determination of the Illinois Supreme Court which found that the testimony of Officer Montejano, as accepted by the trial court, should not be disturbed.[39] However, this Court is not so bound.

In *Haynes* v. *Washington*, 373 U.S. 503, 83 S.Ct. 1336 (1963), this Court ruled:

> "Our conclusion is in no way foreclosed, as the State contends, by the fact that the state trial judge or the jury may have reached a different result on this issue.
>
> "It is well settled that the duty of constitutional adjudication resting upon this court requires that the question whether the Due Process Clause of the Fourteenth Amendment has been violated by admission into evidence of a coerced confession be the subject of an *independent* determination here, see, e.g., *Ashcraft* v. *Tennessee*, 322 U.S. 143, 147-148, 64 S.Ct. 921, 923, 88 L.Ed. 1192; 'we cannot escape the responsibility of making our own examination of the record' " (83 S.Ct. at 1344).

In its original opinion,[40] the Illinois Supreme Court stated,

> "In spite of the fact that the officers denied making any promises of leniency, it seems manifest to us, from the undisputed evidence and the circumstances surrounding the defendant at the time of his statement and shortly prior thereto, that the defendant understood he would be permitted to go home if he gave the statement and would be granted immunity from prosecution" (R. 110).

Unfortunately, upon rehearing the Court retracted this conclusion and found otherwise, but the fact that six of the

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[39] Brief For Respondent In Opposition at pp. 2, 3 "Preliminary Statement".

[40] R. 107-110. This opinion was superseded by the opinion of May 27, 1963 (R. 125-134) promulgated upon rehearing.

seven justices of the Illinois Supreme Court originally drew this conclusion indicates that there is warrant in the record for accepting petitioner's version of the impermissible techniques used by Officer Montejano to elicit his statement.

> "Detective Montejano made promises to me. He told me that DiGerlando had already made a statement saying that he shot the man, my brother-in-law, and he would see to it that we [petitioner and his sister, Grace, the widow of the deceased] would go home and be held only as witnesses, if anything, if we had made a statement against DiGerlando. He said we would only be held as witnesses against DiGerlando, and that we would be able to go home that night" (R. 17).

Montejano denies the promises. Yet the surrounding circumstances strongly support petitioner's testimony. There would have been no reason for petitioner to give the statement, against his first determination to remain silent, unless he felt that he would be benefitted. The promise of being allowed to go home, and of being granted immunity from further police machinations would likely have swayed any person of petitioner's background and situation, guilty or innocent. Not being allowed to consult with his attorney, petitioner would have no way of knowing that the promise of Montejano was illusory. The petitioner was only aware of the apparent absolute power of the police. He had seen that they had the power to exclude his counsel. Surely he could have felt that the police also had the power to grant him immunity.

Moreover, as in *Culombe* v. *Connecticut*,[41] where the police involved the family of the accused, here petitioner's sister, Grace, the widow of the deceased, had also been arrested. Petitioner testified:

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[41] 367 U.S. 568, 81 S.Ct. 1860 (1961).

"I saw that my sister was being put at the head of this crime and I knew she had not done it and I wanted to help my sister and that is the reason why I made the statement. The fact that I had been made promises by Montejano had a bearing upon my making this statement. The fact that the police officers made promises specifically that I would not be prosecuted if I made this statement had an effect upon my making the statement. The promises were in fact the motivation that made me make this statement" (R. 19).

If the testimony of petitioner is determined by this Court to reflect the true facts, then the pre-trial statement must, of course, be rejected as involuntary. Compare *Lynum* v. *Illinois*, 372 U.S. 528, 83 S.Ct. 917 (1963). However, even if Officer Montejano's denials are accepted as more reliable, the combined effect of the uncontroverted facts, to wit: the refusal of the police to allow petitioner to consult with his counsel; the incommunicado detention of petitioner; the failure to inform petitioner of his constitutional rights; the confrontation of petitioner with a false accuser; the questioning by relays of police and a State's attorney; and petitioner's unlawful arrest of which his statement was the fruit; especially when considered in light of petitioner's age, inexperience, minority group status and upset emotional state[42] resulted in manifold denials of petitioner's right to due process which rendered his subsequent statement inadmissible against him.

[42] Petitioner was agitated and nervous; as he had not slept well in a week. He appeared, to Chief Flynn, to be "nervous, he had circles under his eyes and he was upset" (R. 55).

II.

Due Process of Law Was Denied Petitioner by the Admission Against Him at Trial of a Court Reporter Statement Which Was Obtained From Him Only After His Request to Consult With His Personal Counsel, Who Was Present at the Police Station Demanding to Consult With Petitioner, Was Arbitrarily Denied by the Interrogating Police.

> "Our Constitution guarantees the assistance of counsel to a man on trial for his life in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law. Surely a Constitution which promises that much can vouchsafe no less to the same man under midnight inquisition in the squadroom of a police station" (concurring opinion of Mr. Justice Stewart, *Spano* v. *New York*, 360 U.S. 315, 327, 79 S.Ct. 1202, 1209 (1959)).

In the cases of *Crooker* v. *California* and *Cicenia* v. *LaGay*, this Court held that the refusal of the police to allow those accused their rights to counsel while they were being interrogated by the police did not, *eo ipso*, render their subsequent confessions inadmissible against them at trial as violative of the Fourteenth Amendment to the Constitution. Certiorari has been granted in this case for the purpose of a reconsideration of the correctness of those holdings.

In the case at bar, the petitioner arrived at the Homicide section Detective Bureau of the Chicago Police Headquarters, 1121 South State Street, about 9:30 P.M. on January 30, 1960.[43] He had been brought here under arrest (R. 29).

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[43] Petitioner's testimony on this point places him at the police station earlier in the evening, beginning at about 8:00 P.M. However, in this he appears to be mistaken as all the police agree it was later and Officer Montejano testified it wasn't until later. The arresting officer Gerald T. Sullivan testified he arrived at the Detective Bureau with petitioner around 9:30 or 9:45 (R. 100).

Petitioner testified that, when he got in the office at 11th and State, he asked for the right to speak to his counsel (R. 17, 86). This right was never granted him. Attorney Wolfson testified that he had arrived at the police headquarters detective bureau between 9:30 and 10:00 in the evening. Sergeant Pidgeon was the desk sergeant. Attorney Wolfson asked Sergeant Pidgeon for permission to see his client, the petitioner, giving petitioner's name. Sergeant Pidgeon called the bureau "lockup" and informed the attorney that the petitioner had been taken to the homicide bureau from the lockup. The sergeant then called the bureau and told them that petitioner's attorney was waiting to see him. Sergeant Pidgeon then told Mr. Wolfson that he could not see petitioner.

Mr. Wolfson then went upstairs to the homicide bureau. He identified himself to several homicide detectives and again asked permission to see his client. They, too, told him he could not see petitioner. He was then told to see Chief Flynn.[44] Chief Flynn said that he "couldn't see him because they hadn't completed questioning". Despite further repeated requests "with every police officer I could find" they were never allowed to consult and Mr. Wolfson left the station at about 1:00 A.M. never having talked to his client (R. 79-81).[45]

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[44] Mr. Wolfson thought his conference with Chief Flynn was at approximately 11:00 P.M. However, Chief Flynn testified that this occurred "about 10:00 o'clock, 10:10 or 10:15" (R. 56).

[45] It should be noted, inasmuch as the Illinois Supreme Court felt it was significant (R. 127), that at one point during the evening the attorney and the petitioner did, but only in the literal sense, "see" one another. While Mr. Wolfson was demanding of an officer the right to consult with petitioner, petitioner chanced to observe him through an open door. Mr. Wolfson stated that the door was closed after one or two seconds (R. 80). Petitioner stated that, at that point, he heard Mr. Wolfson trying to yell something to him but he didn't understand what he yelled

Chief Flynn confirms this request. His testimony is that about 9:30 he was advised of the presence of an attorney who was there representing petitioner. He asked that the attorney be sent to his office. He talked to the attorney there between 10:00 and 10:15. At this time Flynn had never talked with petitioner. The attorney told him that his client was in custody. The attorney asked to see petitioner (R. 57). Lieutenant Flynn's testimony is aptly summarized by the following excerpt from his redirect examination:

> "The Witness: He came to the third floor at approximately 10:00 o'clock, ten minutes to 10:00, and introduced himself as being namely Wolfson, and he said he had been retained as counsel by Danny Escobedo who was now in custody.
>
> By Mr. Wesolowski:
>
> Q. And what did you say to him?
>
> A. I asked him why he was in custody and when he was arrested.
>
> Q. What did he say to you?
>
> A. He told me that he did not know how long he had been in custody or where he was.
>
> Q. Then what did you say to him, if anything?
>
> A. I told him that I would make an effort to determine if the man was in custody and if he was in the building.
>
> Q. Was there any other conversation at that time?
>
> A. There was.

(R. 21). Petitioner did testify, however, that the attorney motioned to him with his head which petitioner understood to mean that he should not talk to the police (R. 132). However, this testimony in no manner can be construed to mean that petitioner understood that he had a *right* not to talk to the police. It only means that petitioner understood his attorney to advise him, as a practical matter, not to talk to them.

Q. And just tell us what you said to him and what he said to you.

A. I determined that the man was in the building and he was being—he was under questioning relative to a homicide and I explained to him that the man had only been in the building a very short while and as soon as the officers had completed their questioning that he would be allowed to see him.

Q. And what, if anything, did he say to you then?

A. He started quoting some statute relative to his rights and demands as far as seeing his client.

Q. And then what did you say to him?

A. I went—that was the end of it.

Q. That was the end of the conversation?

A. Yes.

Q. Then where did you go and where did he go, if you know?

A. He walked out of the office. At this time I went over to the Homicide" (R. 61, 62).

The testimony of Officer Gerald Sullivan confirms the refusal of Chief Flynn to allow the attorney to consult with petitioner until the police were finished with him, with no time limit being set (R. 30, 31).

The statement of petitioner was not obtained until after all of the foregoing had transpired (R. 31).

The Illinois Supreme Court, in rejecting the contention "that the confession is admissible because it was obtained after [petitioner] had requested the assistance of counsel, which request was denied" (R. 128), held "that the right of a person in custody to see and consult with his attorney does not deprive the police of their right to a reasonable opportunity to interrogate outside the presence of counsel" (R.

134). It is respectfully submitted, that, in light of the constitutional, as well as statutory, rights of an accused to counsel and to be free from the spectre of self incrimination, the police have no such "right".[46] To allow the police any such "right" in a situation where the accused or his counsel request consultation wholly vitiates any rights an accused has under the Constitution.

The most persuasive brief that could be proposed by petitioner has already been written. In the opinion filed in *Crooker* v. *California* on behalf of the four dissenting justices, Mr. Justice Douglas[47] has forcefully and succinctly set forth the grounds and rationale under which the denial of the right of consultation deprives an accused of due process

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[46] A Connecticut appellate court, in *State* v. *Krozel*, 24 Conn. Sup. 266, 190 A.2d 61 (1963), has recently reversed a conviction and ordered the defendant discharged from a drunk driving charge where the police had refused to let him telephone his attorney after he had been charged. The defendant had been arrested by a state trooper, who had observed his erratic driving, and taken to the state police barracks where a routine sobriety test, which the defendant failed, was conducted. He was then "charged" with the offense and placed "in the lockup". Only then, for the first time, did the defendant ask permission to phone his attorney, which request was denied. He was released on bond at 8:00 A.M. the following day, about 8 hours later. There was no confession involved and the totality of the State's evidence consisted of matters that transpired prior to the defendant's request for counsel. Basing its reasoning upon the dissent of Mr. Justice Douglas in the *Crooker* case plus the separate opinion of Mr. Justice Stewart, in the *Spano* case, the Connecticut Appellate Court concluded that the defendant had a constitutional due process right to the assistance of counsel, and that his conviction was fatally defective because his request to telephone his counsel had been denied. This rule would preclude *prosecution* where the right to counsel has been denied, not merely require the exclusion of subsequent confessions.

[47] See also Mr. Justice Douglas' concurring opinion in *Culombe* v. *Connecticut*, 367 U.S. 568 at 637 et seq., 81 S.Ct. 1860 at 1897 et seq. (1961).

which renders any subsequently elicited statement inadmissible.[48] Little can, or should, be added thereto.[49]

Reference, however, might also be made to the concurring opinion of Mr. Justice Stewart in *Spano* v. *New York*, to wit:

> "While I concur in the opinion of the Court, it is my view that the absence of counsel when this confession was elicited was alone enough to render it inadmissible under the Fourteenth Amendment" (360 U.S. at 326, 79 S.Ct. at 1209).

In *Spano*, the accused had already been indicted for the crime for which he was being interrogated. Yet that fact has no real significance insofar as the inherent vice of the procedure and the effect on the accused is concerned.

Recognizing that the existence of an indictment makes no effective difference, the Court of Appeals of the State of New York has just announced, for the State of New

---

[48] It is of interest to note that the trial court evidently applied this standard in the case of the co-accused, Bobby Chan. Both were represented by Attorney Warren Wolfson (R. 5). Both executed statements only after each had requested to speak to Wolfson and he had requested to see them. Chan's statement was suppressed prior to trial and the State chose thereafter not to proceed against him. The only reason that the Court gave for distinguishing the situation of the two, aside from the judge's personal evaluation of the two personalities, was that petitioner was aware that Wolfson was there but Chan wasn't (R. 41). Accordingly Chan's statement was suppressed because his counsel had been refused the right to consult with him. (See also R. 106.)

[49] Professor Broeder has analyzed various decisions of this Court that have been rendered since the *Crooker* and *Cicenia* cases (Broeder, op. cit., 42 Neb. L. Rev. 483 at 598-606 (1963)). He has been "virtually compel [led to] the conclusion that the dissenting opinions in *Crooker* and *Cicenia* represent the view of a majority of the Court's present membership and that, at the least, due process now requires the exclusion of any confession obtained in the absence of counsel when a defendant has requested that one be present during the questioning" (id. at 606).

York, the rule here proposed by petitioner. In *People* v. *Donovan*, 13 N.Y. 2d 148, 193 N.E. 2d 628 (1963), Donovan and a co-defendant had been apprehended by police a day after a murder and robbery had occurred. Both were questioned at a police station and, after a period of interrogation by police and prosecutor, admitted their guilt orally and in writing. The written confession was taken from Donovan after the police had refused to allow an attorney, retained for him by his family while he was in custody, to see or speak to him. New York's highest tribunal held:

> "that, quite apart from the Due Process Clause of the Fourteenth Amendment, this State's constitutional and statutory provisions to the privilege against self incrimination and the right to counsel * * *, not to mention our own guarantee of due process * * *, require the exclusion of a confession taken from defendant, during a period of detention, after his attorney had requested and been denied access to him." [30]

The language of the New York Court aptly states and resolves the issue:

> "It needs no extensive discussion to establish the high place which the privilege against self incrimination enjoys in our free society. The right of an accused to counsel as a procedural safeguard in our system of government enjoys equal eminence. [Citations] In the case before us, these rights and privileges converge, for one of the most important protections which counsel can confer while his client is being detained by the authorities is to preserve his client's privilege against self incrimination and prevent the deprivation of that and other rights which may ensue from such detention. It would be highly incongruous if our

[30] 193 N.E. 2d at 629.

system of justice permitted the district attorney, the lawyer representing the State, to extract a confession from the accused while his own lawyer seeking to speak with him, was kept from him by the police.

"We have held—and the United States Supreme Court has recognized (see *Crooker* v. *California*, 357 U.S. 433, 439-440, 78 S.Ct. 1287, 2 L.Ed. 2d 1448, supra,)—that the right to counsel extends to pre-trial proceedings as well as to the trial itself. [Citations] The need for a lawyer is surely as great then as at any other time; as Mr. Justice Black pointedly observed in the course of a dissent, 'The right to use counsel at the formal trial is a very hollow thing when, for all practical purposes, the conviction is already assured by pre-trial examination.' (In re *Groban*, 352 U.S. 330, 344, 77 S.Ct. 510, 519, 1 L.Ed. 2d 376.)

"It has, however, been urged that to permit a suspect, in cases such as the present, to confer with an attorney before talking to the police would preclude effective police interrogation and would in many instances impair their ability to solve difficult cases (See, e.g., *Crooker* v. *California*, 357 U.S. 433, 441, 78 S.Ct. 1287, 2 L.Ed. 2d 1488, supra; *Cicenia* v. *Lagay*, 357 U.S. 504, 509, 78 S.Ct. 1297, 2 L.Ed. 2d 1523, supra; *People* v. *Escobedo*, 28 Ill. 2d 41, 47-50, 190 N.E. 2d 825, 828-829). Weighty though such considerations be, they do not permit us to ignore rights due that accused under our law. We gave thought to somewhat similar arguments in recent cases and rejected them as insufficient reason for disregarding individual rights when we stamped as impermissible police interrogation of an accused, in the absence of counsel, following his arraignment or indictment and held inadmissible the resulting confessions even though they were concededly uncoerced and voluntary. [Citations]

"We find these arguments equally unsubstantial in this case. Just as in those cases we condemned post-arraignment and post-indictment questioning 'without the protection afforded by the presence of counsel' (*People* v. *Waterman*, 9 N.Y. 2d at p. 565, 216 N.Y.S. 2d, at p. 75; 175 N.E. 2d, at p. 448), so here we condemn continued incommunicado interrogation of an accused after he or the lawyer retained by him or his family has requested that they be allowed to confer together. And, it necessarily follows, if such a request is refused and a confession thereafter obtained, its subsequent use not only denies the accused the effective assistance of counsel but also, to quote from our opinion in *Waterman*, 9 N.Y. 2d at p. 565, 216 N.Y.S. 2d at p. 75, 175 N.E. 2d, at p. 448, 'contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime.'" [51]

It should be observed that Donovan had not asked for the attorney nor had he retained him. The attorney had been retained for Donovan by his family without his knowledge and Donovan was not aware that his attorney had been at the station. The case at bar is much more extreme than *Donovan*. Here the attorney had been personally retained by petitioner. Here, in addition to the attorney asking to see petitioner, petitioner asked to see his attorney. Here petitioner learned that his attorney was at the station asking to see him, but he quickly was made aware that this was being denied. Thus the effect of the lack of consultation is much more coercive on petitioner than it was on Donovan. If it is a denial of due process, which renders a subsequent confession inadmissible, to refuse to allow an unknown [to the suspect] and unrequested [by the suspect] attorney to consult with an unaware [of his presence] prisoner, it

[51] 193 N.E. 2d at 629-630.

is a greater denial to refuse to allow a retained and requested attorney to consult with a prisoner who knows that the attorney, albeit unsuccessfully, is trying to gain access to him.

It is respectfully submitted that the rule required by the due process clause of the Constitution of the State of New York, in conjunction with the guarantees to counsel and freedom from self incrimination, is likewise required by the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Therefore, this Court is urged to announce that, upon reconsideration, the holdings of *Crooker* and *Cicenia* have been overruled and the standard proposed by the dissenting justices therein, the same standard adopted by the Court of Appeals of New York, has been adopted.

Conclusion

For the reasons stated in this brief, the judgment below should be reversed, since the sole evidence of petitioner's guilt is contained in the inadmissible statement obtained in derogation of petitioner's right to due process of law.

Respectfully submitted,

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No. 615

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

DANNY ESCOBEDO,

Petitioner

vs.

STATE OF ILLINOIS,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION AMICUS CURIAE.

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INTEREST OF AMICUS.

The American Civil Liberties Union, appearing herein with the consent of all parties, filed with the Clerk of the Court, is a national, non-partisan organization devoted solely to the protection and advancement of constitutional rights which are fundamental to the democratic way of life. *Amicus* believes in the necessity of securing to all persons suspected or accused of crime the right to consult with counsel at every stage in the course of criminal proceedings from arrest through final judgment and appeal. This case raises the vital question

of whether denial until after police interrogation has been completed of an arrested suspect's request to consult counsel violates the prisoner's rights under the due process clause of the Fourteenth Amendment. *Amicus* contends that the decisions of this Court in *Crooker* v. *California*, 357 U.S. 433 (1958) and *Cicenia* v. *Lagay*, 357 U.S. 504 (1958), which answer this question in the negative, should be reconsidered and overruled.

ARGUMENT.

I. Denial by the Police of an Arrested Suspect's Request to Consult Counsel Until After the Completion of Informal Police Interrogation Cannot Be Reconciled with the Principle of Fair Trial Embodied in the Due Process Clause of the Fourteenth Amendment.

In *Crooker* v. *California*, a majority of the Court refused to hold that denial of a request to consult counsel made by a suspect in police custody violated the suspect's rights under the due process clause of the Fourteenth Amendment. The majority opinion took the position that such a rule would "preclude police questioning—*fair as well as unfair*—until the accused was afforded opportunity to call his attorney" and would have a "devastating effect on enforcement of criminal law." 357 U.S. 433, 441. Similarly, the Illinois Supreme Court in the instant case upheld the propriety of "fair and reasonable" and "effective" questioning of a suspect in the custody of the police following their denial of the prisoner's request to consult counsel. Transcript of Record 130, 131, 134.

We urge that the Court reconsider its ruling in *Crooker* and the companion *Cicenia* decision and hold that a confession obtained during police interrogation of a suspect in custody following their denial of his request to consult counsel is inadmissible in evidence under the due process clause of the Fourteenth Amendment. Police interrogation under these circumstances is inherently coercive, involves a denial of the specific constitutional right to counsel and is fundamentally irreconcilable with the constitutional principle of fair trial embodied in the due process clause of the Fourteenth Amendment.

What is the "fair" police questioning which the majority opinion in *Crooker* deemed necessary to permit? What is the "fair and reasonable" and "effective" police questioning which was upheld by the Illinois Supreme Court in this case? These general terms can be understood only by examining the interrogation practices which are in actual use by American police today. Since police interrogation of arrested persons is characteristically conducted in privacy and without a record being made, the best sources for such understanding are the published manuals of police interrogation. The principal ones are cited below.[1]

We urge the Court to examine these books. They are not exhibits in a museum of third degree horrors. Indeed they carefully advise the police interrogator to avoid tactics which are clearly coercive under prevailing law. They are invaluable because they vividly describe the kinds of interrogation practices which are accepted as lawful and proper under the best current standards of professional police work.

We speak only of the interrogation of suspects who are in police custody, that is, persons against whom the police have or should have probable cause to justify an arrest. What the police interrogation manuals reveal is

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[1] Inbau and Reid, Criminal Interrogation and Confessions (1962); Inbau and Reid, Lie Detection and Criminal Interrogation (3rd ed., 1953); O'Hara, Fundamentals of Criminal Investigation, Ch. 9 (1956); Arther and Caputo, Interrogation for Investigators (1959); Kidd, Police Interrogation (1940); Mulbar, Interrogation (1951). A summary of the interrogation methods recommended in Inbau and Reid's classic, Lie Detection and Criminal Interrogation (3rd ed., 1953) is contained in Weisberg, Police Interrogation of Arrested Persons: A Skeptical View, 52 J. Crim. L., Crim. & Pol. Sci. 21, 22-26 (1961), reprinted in Sowle, ed., Police Power and Individual Freedom 153, 155-158 (1962).

that "fair and reasonable" and "effective" interrogation of such suspects has the following typical characteristics (references are to the leading manual in this field, Inbau and Reid, Criminal Interrogation and Confessions (1962)):

1. The principal purpose of the police interrogators is to obtain "confessions from the guilty and information from reluctant witnesses or other prospective informants." p. vii.

2. The length of the interrogation is governed principally by the discretionary judgment of the police interrogators. It may extend for several hours "depending on various factors, such as the nature of the case situation and the personality of the suspect." p. 207. The interrogator is urged to be patient.[2]

3. Such interrogation is conducted in privacy. The only persons present are police interrogators and the prisoner. pp. 1-9.

4. The prisoner is not permitted to talk to a lawyer or a member of his family or a friend until after his interrogation is completed. pp. 112, 167-173.

5. The prisoner is not told by his interrogators that he is not required to answer their questions. pp. 162-7. If the prisoner asserts his right not to answer questions, the interrogator will seek to discourage his uncooperative attitude and persist in urging him to confess. pp. 111-12.

6. The prisoner is not taken before a judicial officer for a preliminary hearing until the interrogation is completed. pp. 158-62.

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[2] "It is well, therefore, to get the idea across, in most case situations, that the interrogator has 'all the time in the world.'" Inbau and Reid, p. 109.

7. No record of the actual interrogation is made. In the event of later disputes about the conduct of the interrogation, the available evidence is usually limited to the testimony of the defendant and the police who were present at the interrogation. pp. 1, 177-8.

8. In the course of the interrogation the prisoner may or may not be informed of the offense of which he is suspected, and may or may not be confronted by his accusers. pp. 81-88, 91.

9. The particular methods which are recommended for use in such "fair" interrogation include the following:

(a) Questioning the prisoner on the expressed assumption that he is guilty. Thus, the interrogator is counselled to "display an air of confidence in the subject's guilt" and "avoid having the subject indulge in repeated denials of guilt." pp. 23, 24.

(b) The use of pretended sympathy and other emotional appeals to establish a relationship of rapport and confidence between the prisoner and his interrogator. pp. 34-36, 55-60.

(c) The use of false statements to trick the prisoner. Two common examples are the bluff in which the interrogator falsely tells his prisoner that a confederate has confessed and implicated him and the interrogator's pretense that he has non-existent physical evidence of the prisoner's guilt. pp. 28, 81-88, 100.

(d) The encouragement of confession by condemning the victim of the crime, by minimizing the moral seriousness of the offense, or by suggesting the possibility that the accuser has exaggerated the offense. pp. 36-55, 60-66.

(e) Repeated accusations to the prisoner that he is lying, coupled with the exhortations to tell the truth. *passim.*

(f) Accusing the prisoner of other crimes of which he is actually believed innocent. pp. 62-66, 119-120.

(g) The use of certain allegedly common-sense principles for distinguishing guilty suspects, such as unwillingness to take a "lie detector" or "truth serum" test. pp. 100-105.

(h) The use of certain types of non-violent physical contact, such as securing the suspect's knees between the legs of the interrogator, holding the suspect's chin so that the interrogator can stare directly into his eyes, and clasping the suspect's fidgeting hands and twitching shoulders in order to "bottle up" natural expressions of nervousness.[3]

The above brief description is not a selection of the worst "horribles" from the interrogation manuals, but a neutral description of the interrogation methods which would apparently be generally approved by professional police today. However, the interrogation manuals may not always meet this standard. Consider the following examples:

Jolting

> "The questioning is conducted at some length in a quiet, almost soothing manner. By constantly observing the suspect the investigator chooses a propitious moment to shout a pertinent question and appear as though he is beside himself with rage. The subject may be unnerved to the extent of confessing."[4]

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[3] Arther and Caputo, Interrogation for Investigators (1959), 97-99; Inbau and Reid, pp. 23, 31.

[4] O'Hara, Fundamentals of Criminal Investigation, 108. (1956).

Reverse Line-up

"This technique is applicable in crimes which ordinarily run in series, such as forgeries and muggings. The accused is placed in a line-up, but this time he is identified by several fictitious witnesses or victims who associated him with different offenses. It is expected that the subject will become desperate and confess to the offense under investigation in order to escape from the false accusations."[5]

Lengthy Interrogations

"Where emotional appeals and tricks are employed to no avail [the investigator] must rely on an oppressive atmosphere of dogged persistence. He must interrogate steadily and without relent, leaving the subject no prospect of surcease. He must dominate his subject and overwhelm him with his inexorable will to obtain the truth. He should interrogate for a spell of several hours pausing only for the subject's necessities in acknowledgment of the need to avoid a charge of duress that can be technically substantiated. In a serious case, the interrogation may continue for days, with the required intervals for food and sleep, but with no respite from the atmosphere of domination. It is possible in this way to induce the subject to talk without resorting to duress or coercion. The method should be used only when the guilt of the subject appears highly probable."[6]

It is generally recognized that the type of police interrogation we have described involves the danger of abuses, not only physical mistreatment of the prisoner but also other abuses which are morally and psychologically equivalent to physical force. The relationship between the police interrogator and his prisoner unavoidably invites abuses,

[5] Id. 106.
[6] Id. at 112.

not because policemen are any more brutal than the rest of us, but because the officer's natural indignation at crimes of violence, his position of relative sophistication and control over the prisoner, the absence of disinterested observation and, above all, the frustration of suspended judgment, all lead him to justify the use of means which would be rejected if exposed to public scrutiny.

Realistically, the police interrogator who makes it clear to his prisoner that he has "all the time in the world" for their private interview is asserting the right to have his questions answered. Wigmore saw the problem very clearly when discussing the privilege against self-incrimination:

> "The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer, that is, to a confession of guilt."[7]

The denial of counsel in the setting we have described is inherently coercive. As the majority opinion in *Crooker* recognized, coercion is more likely to result from the denial of a specific request for counsel than from the failure to appoint counsel immediately upon arrest. 357 U.S. 433, 438. The prisoner whose request for counsel is denied can reasonably infer that his interrogators intend to continue his imprisonment and interrogation until they are satisfied with the results. The one word rejecting his request may thus exert more effective coercion than hours of detention without any such rejection of a right asserted by the prisoner. At least where a prisoner

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[7] Wigmore, Evidence, Sec. 2251, at 309 (3rd ed. 1940).

suspected of a capital crime has been denied access to counsel, his subsequent interrogation by police seeking a confession is fundamentally unfair and any resulting confession must be excluded from his trial under the due process clause of the Fourteenth Amendment.

The denial of counsel during police interrogation is also inconsistent with the specific constitutional right to counsel. The unanimous decisions in *Hamilton* v. *Alabama*, 368 U.S. 52 (1961) and *White* v. *Maryland*, 373 U.S. 59 (1963), hold that the right extends to any "critical stage in a criminal proceeding" irrespective of "whether prejudice resulted." It is generally recognized that the period immediately following arrest is one of the most critical stages in a criminal proceeding. This is the time when the prospective defendant needs a lawyer most.[8] The lawyer is needed at this stage not only to enforce the basic protections afforded all persons accused of crime, such as the right of silence, the right to bail, the right to be informed of a specific charge and to be presumed innocent thereof, and the right to immediate freedom if continued detention is illegal; he is also needed for the immediate preparation of the defense.

Four years ago a select committee of the Association of the Bar of the City of New York and the National Legal Aid and Defender Association published an extensive study of the defense of indigents accused of crime. In its conclusions and recommendations, the committee stated:

> "... [I]f if the rights of the defendant are to be fully protected, the defense of a criminal case should begin as soon after arrest as possible. There is a strong

[8] Allison, He Needs a Lawyer Now, 42 J.Am.Jud.Soc. 113 (1958).

argument that the time a defendant needs counsel most is immediately after his arrest and until trial. During this period, unless the defendant has counsel, there is no one charged with the duty of protecting his interests and gathering the evidence which may be essential to his defense. The defendant, who is usually in jail, is incapable of doing anything to help himself and, while the prosecution is carefully building its case, the defendant's case may be destroyed by the mere passage of time.

"It is the opinion of this committee that representation must be provided early if it is to be effective. This conclusion is not affected by the argument that the prosecution will be impeded by defense counsel in the performance of its duties." Equal Justice for the Accused, (1959) p. 60.[9]

The coercive influence which is implicit in denial of the prisoner's request for counsel and the prospective defendant's need for counsel indicate the importance of giving constitutional protection to the right to counsel before and during private interrogation by the police. There is, however, an even deeper sense in which private police questioning of arrested suspects is irreconcilable with the constitutional principle of fair trial.

The type of "fair and reasonable" and "effective" police interrogation which has been described in this brief and in effect sanctioned by the Illinois Supreme Court in this case adds a stage to criminal prosecutions which is not described in the statutes or judicial decisions relating to criminal procedure—a preliminary, secret and informal examination by interrogators whose actions are not governed by judicial standards and are essentially unsupervised. Indeed, the courts could not effectively supervise such pro-

[9] See also Beaney, Right to Counsel Before Arraignment, 45 Minn. L.Rev. 771, 780 (1961).

ceedings even if full records were made for review. How could the courts decide when "reasonable" interrogation had come to an end? Would the test be whether the police feel that they have exhausted the possibilities of obtaining information by further interrogation? Would it be whether they have had an adequate opportunity to try the sympathetic approach, the "friend and enemy act," "bluffing on a split pair" and the other formulae in the interrogator's guide? How many times should it be proper to urge the prisoner to confess before reasonable interrogation has come to an end? Is the reasonableness of an interrogation opportunity to be measured by the result? How many times should the police be "reasonably" entitled to press for an answer or refuse to accept explanations which they think false? Does the length of "reasonable" interrogation vary directly or inversely with the determination of the prisoner to remain silent or persist in answers which the police disbelieve?

The contrast between interrogation in a police station and the standards of fairness which are required in judicial hearings could hardly be greater. Proceedings in a court are open and dominated by an insistence on procedural regularity. The conflict of interest between the accused and the prosecution is recognized explicitly and mediated by an impartial judge. Although the same conflict is present in the police station, where the prisoner-suspect is in jeopardy of a criminal charge, the prospective defendant is nevertheless left under the supervision and control of investigators who naturally share the purposes and outlook of the prosecutor.

A thoughtful police official has described some of the resulting problems:

"Officers who have formed definite opinions as to guilt or circumstances may innocently exert a strong influence on the statements of witnesses whom they interrogate. Furthermore, when investigators allow theories of situations to form before there are sufficient facts disclosed to support them, they are likely to find their subsequent investigation restricted to a search for facts to lend support to the ill-conceived theory. . . .

"Many hazards instantly appear when a criminal investigation centers upon certain suspects because of theories prematurely entertained. The most troublesome of these hazards is that of premature arrest. Arrests of this character are not made by reason of a logical analysis of supporting facts, but they occur by reason of the influence of the preconceived theory, strengthened in part by other conjectures such as the probability of the suspect escaping the immediate jurisdiction, or as in many instances, the hope that by severe grilling the suspect may be brought to the point of putting his own neck in the noose by confessing his crime. In every instance of premature arrest it eventually becomes apparent that there is not sufficient real evidence to support a specific charge. This condition leads to further compromising situations, and the effect of the troublesome factors are forestalled or delayed by resorting to other questionable practices, thus setting off a chain of illegal action that may run the gamut of condemned practices, from the filing of unjustified vagrancy charges with exorbitant bail, through incommunicado confinement to escape the writ of habeas corpus; coercive grilling, in the hope of securing a confession; third degreeing when coercion fails; and even on up to actual 'framing,' which has too frequently occurred.

"Policemen, in their eagerness to detect crime and to apprehend and bring criminals to justice, are inclined to overlook the importance of separation of governmental function as a safeguard of personal liberty. They are wont to usurp the prerogatives of the judiciary in fixing the guilt or innocence of the accused, and in eagerness to assert this pseudo authority will resort to practices that are questionable or highly irregular if not actually illegal."[10]

Informal and unsupervised examination of arrested suspects by police interrogators is fundamentally unfair to the police interrogators as well as the prisoner. Left with virtually unlimited discretion, the interrogator becomes the sole judge of what is proper questioning. His position is impossibly conflicting. On the one hand, he is expected to act as an agent for the prosecuting authorities, to collect evidence and, if possible, to secure confessions. On the other hand, he is expected to treat his prisoners fairly and objectively. He is expected to meet this standard without the guidance of clear rules or disinterested scrutiny and review. Under these circumstances it is unfair to give such broad power to the most disciplined and conscientious men and expect them to exercise it in accordance with judicial and constitutional standards of fairness.

At least where a prisoner suspected of a capital crime has been denied access to counsel, his subsequent interrogation by police seeking a confession is fundamentally unfair and any resulting confession must be excluded from his trial under the due process clause of the Fourteenth Amendment.

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[10] Kooken, Ethics in Police Service 54, 55 (1957).

II. The Denial of Counsel to Arrested Suspects Cannot Be Justified on the Ground that Law Enforcement Will Be Unduly Hampered.

The view that counsel in the police station will "handcuff" the police is the position taken by the majority in *Crooker* and *Cicenia* and, of course, by most prosecutors and police officials. With due respect we submit that this oft-stated contention is only an assumption, not a conclusion based on fact. The variables which determine the efficiency of criminal investigation and successful prosecution are so complex that no one really knows the extent to which seemingly more restrictive rules in this area actually do or will hamper the police. At present, only one thing is certain: it is yet to be demonstrated that effective crime control varies inversely with the enforcement of constitutional rights.[11]

Given the complexity of the problem and the lack of reliable data, the courts are not in a position to make informed judgments about the effects of particular constitutional rules on police efficiency. What the courts can and should do is insure the basic constitutional right of prospective defendants to a fair trial. If that right is protected by restricting the power of the police to deny counsel, and legitimate police work is hampered as a result, then it is the responsibility of the community to provide

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[11] Kamisar, Public Safety v. Individual Liberties: some "Facts" and "Theories", 53 J. Crim. L. Crim. & Pol. Sci. 171, 184-93 (1962). Also see Report and Recommendations of the Commissioners' Committee on Police Arrests for Investigation, Wash., D.C. (1962), possibly the only statistical survey ever made of arrests for investigation:

> "The conclusion must be that the generous interrogation privileges which the present practice of arrests for 'investigation' furnishes to the police result in the charging of relatively very few offenders." p. 33.

the police with the human and material resources needed to do a better job. The supposed price for police efficiency should not be imposed entirely on the suspect held in police custody.

Assertions that the police would be "handcuffed" by the protective rule urged here cannot justify the virtually unlimited discretionary power which is at issue in this case, a power which effectively nullifies the basic and historic right to fairness in a criminal proceeding.

CONCLUSION.

For the reasons stated, *amicus* prays that the judgment of the Illinois Supreme Court be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 615

DANNY ESCOBEDO,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF FOR THE RESPONDENT.

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SUMMARY OF ARGUMENT.

A.

The record here shows that petitioner, a twenty-two year old married man and the father of a child confessed to the crime of murder approximately one and a half hours after being taken into custody. Though he was questioned intermittently by several officers at different times, the questioning was neither continuous, nor of long duration and was not conducted in "relays" of police officers. Petitioner agreed to make a statement shortly after being confronted by a co-defendant, Benedict DiGerlando, who accused him of murdering Manuel Valtierra, petitioner's

brother-in-law, although he had not confessed while in custody after being arrested some ten days earlier.

While at the police station, and before admitting his guilt, petitioner requested the opportunity to confer with counsel. His attorney, who was then present, attempted to see petitioner but was told by police that he had been in custody only a short time and was being questioned. Such factors were not coercive however because:

(1) petitioner had consulted daily with his counsel during the ten day period between his first and second arrests.

(2) petitioner was aware of his constitutional right to be free from self incrimination and was specifically told by his counsel not to answer police questions.

(3) petitioner's counsel made a sign to him through an open door at the police station which he interpreted to mean that his lawyer's command of silence was still in effect. This occurred prior to the giving of the confession.

There is nothing in this record to show that petitioner has less than normal intelligence, maturity, judgment or education. He was not shown to be specially susceptible to police pressure or easily misled by police authority. And though petitioner testified that forbidden promises of immunity were made they were squarely denied by the police and are foreclosed on this review.[1]

In short, the evidence in this case compels the conclusion that petitioner's confession was, beyond question, voluntary in nature.

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1. *Watts* v. *Indiana*, 338 U. S. 49, 51-52; *Thomas* v. *Arizona*, 356 U. S. 390, 402-403.

B.

Crooker v. *California*, 357 U. S. 504 and *Cicenia* v. *La Gay*, 357 U. S. 433 hold that the denial of petitioner's request for counsel during police questioning was not a denial of the right to counsel protected by the due process clause of the fourteenth amendment.[2] *Crooker* and *Cicenia* should not be overruled because:

(1) the rule they lay down is consistent with fundamental fairness and effects a balance between society's interest in law enforcement—giving police the right of reasonable, private questioning of suspects in attempts to solve difficult and brutal crimes—and the individual's right to liberty—allowing free reign to the doctrine that confessions which are extorted, coerced or obtained under circumstances inconsistent with due process will be excluded from evidence.

(2) such a course would, without question, eliminate confessions, an indispensable tool of law enforcement, from the arsenal of the police in their struggle with crime.

(3) an intolerable burden of administration would be thrust upon local police who would be utterly incapable of insuring effective representation by counsel to all persons taken into custody from the moment of their arrest.

(4) the extension of the right to counsel to the time of arrest would be utterly inconsistent with "those procedures that are fair and feasible in the light of [now] existing values and capabilities."[3]

(5) such a ruling would cripple law enforcement to

2. Beaney, *Right To Counsel Before Arraignment*, 45 Minn. L. Rev. 771, 777 (1961).

3. Schaefer, *Federalism And State Criminal Procedure*, 70 Harv. L. Rev. 1, 6 (1956).

an extreme degree without affording a significant counter-balancing gain in society's respect for individual liberties. The impact of this Court's decisions in *Mapp* v. *Ohio*, 367 U. S. 643 and *Gideon* v. *Wainwright*, 372 U. S. 335 upon the enforcement of state criminal law would pale by comparison.

(6) those commentators upon whom this Court has relied in the past, and who count among those with no hostility to the fullest enjoyment of individual constitutional rights, agree that the extension of the right to counsel to the time of arrest would be unrealistic in today's society.[4]

4. Kamisar, *The Right To Counsel And The Fourteenth Amendment: A Dialogue On "The Most Persuasive Right" Of An Accused*, 30 U. Chi. L. Rev. 1, 11 (1962); Beaney, *Right To Counsel Before Arraignment*, 45 Minn L. Rev. 771, 781 (1961).

ARGUMENT.

I.

THE RECORD IN THIS CASE ESTABLISHES THAT THE CONFESSION OF PETITIONER WAS VOLUNTARY AND THAT ITS ADMISSION INTO EVIDENCE WAS NOT A VIOLATION OF DUE PROCESS.

The first challenge to the confession in this case raises the issue of voluntariness. The totality of the circumstances surrounding the making of the confession, petitioner contends, compels the conclusion that it was not voluntarily made.

We agree that this court must determine the nature of the confession from "an examination of all the attendant circumstances." (*Haynes* v. *Washington*, 373 U. S. 503, 513.) We do not agree that such an examination will disclose that petitioner's "will was overborne at the time he confessed." (*Lynumn* v. *Illinois*, 372 U. S. 528, 534.) We believe the Court will find from a close scrutiny of this record that, without question, the confession here involved was voluntary under the teachings of the prior cases in this Court. We turn then, to a discussion of those elements petitioner deems relevant to the determination of this question.

A.

The Refusal of the Police to Allow Consultation With Counsel.

Haynes v. *Washington*, 373 U. S. 503 and *Gallegos* v. *Colorado*, 370 U. S. 49 have authoritatively determined that the absence of counsel during police questioning is "unquestionably a circumstance which the accused is en-

titled to have appropriately considered in determining voluntariness and admissibility of his confession," regardless of "whatever independent consequence [this factor] may otherwise have." (373 U. S. at 517.) The facts of this case, however, do not show that the "denial" of counsel here contributed to a coercive atmosphere which ultimately produced an involuntary statement on the part of petitioner.

In both *Haynes* and *Gallegos*, the defendants confessed in the absence of any prior consultation with, or advice from, an attorney. And though Gallegos was told of his right to counsel, this Court found that his youth precluded any assumption that he was "a person . . . [equal] to the police in knowledge and understanding of the consequences of the questions and answers being recorded."[5]

The present case is manifestly different because:

(1) Petitioner had been released from police custody ten days earlier through the effort of his counsel in obtaining a writ of habeas corpus (R. 8, 16);

(2) Petitioner had consulted daily with his counsel concerning this case during the ten day period from January 20 (the date of the first arrest) to January 30 (the date of the second arrest) (R. 8);

(3) Petitioner told the police that his attorney had warned him not to answer police questions and had instructed him to refuse to answer until he "had the advice of my lawyer." (R. 20-21);

(4) Petitioner saw his attorney in the police station before confessing and interpreted a wave or motion made by his attorney to mean that he should not speak to the police, thus reinforcing his earlier advice (R. 28).

5. *Gallegos* v. *Colorado*, 370 U. S. 49, 54.

These circumstances are absent from any case in this Court where, considering the lack of counsel as one element in the total atmosphere of coercion, this Court has rejected a confession in a state criminal case as involuntary. (See *Gallegos* v. *Colorado*, 370 U. S. 49; *Haynes* v. *Washington*, 373 U. S. 503; *Haley* v. *Ohio*, 332 U. S. 596). On the other hand, they most nearly resemble the facts of *Cicenia* v. *La Gay*, 357 U. S. 504, where, contrary to petitioner's assumption, this Court did consider and decide the issue of voluntariness and found that "petitioner failed to substantiate the charge that his confession was coerced" (357 U. S. at 508), and *Crooker* v. *California*, 357 U. S. 433, where this Court found that the possibility of coercion was "negated by petitioner's age, intelligence, and education" as well as his obvious awareness of the right to refuse to answer questions.

Petitioner here was two years older than Cicenia, and while younger than Crooker, he was a mature man of twenty-two years who was married and the father of a child. Though petitioner did not make any record below concerning the extent of his formal education, we have the express finding of the trial judge, relied upon by the Supreme Court of Illinois in reaching its conclusion that the confession was voluntary, that:

> "I was impressed with this defendant's intelligence . . . he certainly is not ignorant by a long stretch of the imagination. He is pretty keen. . . ." (R. 41.)

Petitioner contends also that "the evil of the denial of the right of petitioner and his counsel to consult with each other is *compounded* by the fact that the police refused this right *despite a positive state statute granting it.*" (Br. 12) (Emphasis added.) Here petitioner misreads Illinois law. The question of whether these statutes allow consultation with counsel before or during police questioning which follows arrest was authoritatively determined con-

trary to petitioner's contentions by the Supreme Court of Illinois in the very opinion now pending for review in this Court—*People* v. *Escobedo*, 28 Ill. 2d 41, 190 N. E. 2d 825. In reaching this conclusion, the Supreme Court of Illinois held:

> "Defendant, of course, had the right to consult with counsel at the pretrial stages of the criminal proceeding . . . (citing Ch. 38, §§ 449.1, 477, Ill. Rev. Stat., 1959).[6] These statutes show a legislative policy against the police or other public officers insulating a person from his attorney, *but it does not follow that the legislature intended that the statutes operate to insulate the person from the police or other public officials.*" 28 Ill. 2d at 51-52, 190 N. E. 2d at 830-831 (R. 133). (Emphasis added.)

We interpret this language to mean not that the Illinois Supreme Court sanctioned the admissibility of the confession despite a violation of state law, but rather that the court was holding that refusal to allow consultation with counsel before or during post-arrest interrogation was *not* a violation of state law. This reading of the opinion is strengthened by the additional conclusion of the Supreme Court of Illinois that:

> "Having given due weight to the various considerations involved, we are of the opinion that the right of a person in custody to see and consult with his attorney does not deprive the police of their right to *a reasonable opportunity to interrogate outside the presence of counsel.*" 28 Ill. 2d at 52; 190 N. E. 2d at 831 (R. 133-134). (Emphasis added.)

The statutes upon which petitioner relies, therefore, to reach the conclusion the "evil" of the absence of counsel was "compounded" by police activity, illegal even under Illinois law, have been interpreted by the highest court of

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6. Transferred in 1961 to Ch. 38, §§ 736(b), 736(c) Ill. Rev. Stat. (1961).

Illinois to allow the police conduct in question here for a reasonable period of time following arrest.

B.

The Knowledge of Constitutional Rights.

Petitioner claims that the failure of the police to warn him concerning his constitutional rights contributed to the involuntariness of the confession. How this claim may be maintained in the teeth of a record that fairly shouts the conclusion that petitioner was entirely aware of his rights we do not understand. Consider:

(1) Petitioner knew that his attorney had been able to effect his release from police custody for the homicide in question on a prior occasion.

(2) Petitioner consulted daily, for a period of ten days, with his retained attorney concerning the very homicide investigation which led to his re-arrest. Of what earthly good would such consultations be if they did not concern the subject of petitioner's rights should he again be subjected to police custody?

(3) But, says petitioner, his "attorney had not explained to petitioner the *substance* of all his various rights but had merely told petitioner what to do and say, but not *why*." (Br. 19) (Emphasis added.) Whether this subsumes that only a lecture worthy of *Constitutional Law 101* will suffice to protect a prisoner from a misunderstanding of his right to remain free from self-incrimination we do not know, but surely, if petitioner is correct in this argument, then it follows that even if counsel had been allowed to confer with Escobedo at the police station he would have told him no more,

and probably would have told him less, than he had told him in the prior daily conferences.

Given counsel's present concession that Escobedo entered the police station on the night of January 30 armed with his lawyer's prior explanations of "the substance of all his various rights" and specific instructions of "what to do and say" (Br. 30), then it is clear that the rationale of such cases as *Gallegos* and *Haynes* do not compel a reversal here. Moreover, we do not understand petitioner's attempt to distinguish *Crooker* on the ground that "the denial of counsel was held non-prejudicial [there] because the accused knew of, and exercised, his constitutional rights." (Br. 20.) Assuredly, Crooker exercised his constitutional right to remain silent until the point when he decided to abandon that right and confess. But the same is true of petitioner here. He at first refused to answer police questions and denied all knowledge of the homicide, citing in support of his refusal, *inter alia*, the injunction of his lawyer not to talk. He then abandoned this position and answered police questions. *Crooker*, therefore, is not distinguishable, but decisive, on this issue.

C.

Incommunicado Detention.

It is certainly true that from the time of defendant's arrest to the time he confessed he was in the custody of the police and that he was not seen by any friend, save co-defendant Chan, or relative. So far as the record reflects, no friend or relative asked to see him and he did not ask to see them. And while his lawyer was refused admittance for the purpose of consultation, the "coercive atmosphere of incommunicado detention," if it existed, was broken by

the sight of his lawyer through the open door and the receipt of the signal reinforcing the earlier advice of the lawyer not to talk to the police.

Detention in the custody of police, however, is the common thread of every confession case coming to this Court. Rarely, if ever, do arrestees confer with family and friends before confessing. And here the period between arrest and confession was only a little over an hour and a half, certainly one of the shortest times to be considered by the Court in a case of this kind. Ten days earlier petitioner had been held by the police before being released on a writ of habeas corpus. He did not confess during this "incommunicado" detention. It is inconceivable that one and a half hours of detention contributed to the coercion of any statement on January 30. See: *Crooker* v. *California*, 357 U. S. 433, 437; *Stein* v. *New York*, 346 U. S. 156, 184-188.

D.

The Accusation of Co-Defendant DiGerlando.

The claim is made that the "device" of confronting petitioner with his later co-defendant, Benedict DiGerlando, who accused petitioner of shooting Manuel Valtierra, was a "[method] of psychological coercion" that contributed to the making of an involuntary statement (Br. 22). Heavy reliance is placed upon the decision of this Court in *Bram* v. *United States*, 168 U. S. 532, to sustain the proposition that to *accuse* one of a crime during interrogation is inherently coercive. If the prisoner refuses to answer, so the argument runs, his silence will be taken as an indication of guilt so that he is forced either to directly admit guilt or to deny guilt in an inculpatory manner. And since the prisoner is driven to one course or another by the accusation, the argument concludes, any reaction to the accusation must be involuntary.

This result, we fear, is reached only by a less than careful reading of an opinion which Mr. Justice White was at pains to draw most carefully. The admission in *Bram* was not suppressed because it was the product of an accusation of guilt. It was suppressed because of the conjunction of a number of circumstances which this Court felt contributed to a total atmosphere of coercion. Among them:

(1) Bram was clapped in irons aboard ship and then taken to the police authorities as a murder suspect.

(2) Upon reaching the interrogation room, Bram was stripped of his clothing and questioned.[7]

(3) The interrogator assumed that Bram had an accomplice and urged him to confess and name that person in language which this Court thought implied a forbidden promise of leniency.[8]

The opinion in *Bram* is clear, therefore, that it was a combination of all these circumstances that rendered the admission involuntary—this Court did not hold in *Bram* that incriminating statements which follow accusations of guilt are *per se* involuntary.[9] No court has ever gone that far, and with reason. For this very record demonstrates that on at least three separate occasions petitioner simply denied his guilt—was neither silent nor made inculpatory admissions—when directly accused by the police

7. Compare *Malinski* v. *New York*, 324 U. S. 401, 405.

8. Compare *Lynumn* v. *Illinois*, 372 U. S. 530, 535.

9. "... that is to say, *when all the surrounding circumstances are considered in their true relations*, not only is the claim that the statement was voluntary overthrown, but the impression is irresistibly produced that it must necessarily have been the result of either hope or fear, or both, operating on the mind. * * * Although these facts may not, when isolated each from the other, be sufficient to warrant the inference that an influence compelling a statement had been exerted; yet, *when taken as a whole*, in conjunction with the nature of the communication made, they give room to the strongest inference that the statements of Bram were not made by one who, in law, could be considered a free agent." *Bram* v. *United States*, 168 U. S. 532, 18 S. Ct. 183, 194-195 (Emphasis added.)

of shooting Valtierra, and then attributed his confession to several different influences at various times in his testimony.

In the squad car on the way to the police station, just minutes after his arrest:

> "The detectives said they had us [petitioner and his sister, the wife of the murdered Valtierra] pretty well, up pretty tight, and we might as well admit to this crime.
> *I said, 'I still don't know anything of what you are talking about'.*" (R. 17.) (Emphasis added.)

After arriving at headquarters:

> "Then, this one detective, whose name is unknown to me, walked up to me and said: that DiGerlando, that they had proof that I had done the shooting, *and I said, 'I am sorry but I would like to have advice from my lawyer'.*" (R. 17.) (Emphasis added.)

And later:

> "Shortly after that he came back and said they had a witness that said he had seen me shoot my brother-in-law, in the next room. *I said I would like to see my lawyer.*" (R. 17.) (Emphasis added.)

If one believes petitioner, and depending upon which of petitioner's statements one believes, he confessed for reasons having nothing to do with any coercive factors which can find support in the record.

First, petitioner testified, he confessed to no one but Assistant State's Attorney Cooper (R. 21). He did not confess to Officer Montejano (R. 18) and he did not confess to Captain Flynn (R. 18, 22).

He confessed to Cooper because:

> (1) "I saw that my sister was being put at the head of this crime and I knew she had not done it and I wanted to help my sister and that is the reason why I made the statement." (R. 19.)

Comment: There is no testimony in this record

that the police put petitioner's sister "at the head of this crime" in conversations with him after arriving at police headquarters. If petitioner falsely confessed to save his sister, therefore, that has nothing to do with the police action in question here. The truth or falsity of petitioner's confession is not in issue[10] and is not before the Court.

Or petitioner confessed because:

(2) "The fact that I had been made promises by Montejano had a bearing upon my making this statement." (R. 19).

Comment: Montejano denied making the promises and that denial and its acceptance by the trial court and by the Supreme Court of Illinois are conclusive here.[11]

Or petitioner confessed because:

(3) "The fact that the police officers made promises specifically that I would not be prosecuted if I made this statement had an effect upon my making this statement. The promises were in fact the motivation that made me make this statement." (R. 19).

Comment: These promises were also denied and are not in issue here.

It may readily be seen, therefore, that petitioner's argument has undergone an easy metamorphosis between the Criminal Court of Cook County and the Supreme Court of the United States. There he contended that several reasons, none having anything to do with either police coercion proved by undisputed facts or the absence of counsel, were the motivating factors behind his confession. Here he contends that his confession was a false involuntary reply to a false allegation of guilt by DiGerlando (Br.

10. *Rogers* v. *Richmond*, 365 U. S. 534.

11. *Watts* v. *Indiana*, 338 U. S. 49, 51-52; *Thomas* v. *Arizona*, 356 U. S. 390, 402-403; *Rogers* v. *Richmond*, 365 U. S. 534, 536; *Haynes* v. *Washington*, 373 U. S. 515-516.

22). But the only reaction to this accusation which petitioner testified to below was that DiGerlando was "lying" and was "full of of shit"! (R. 25).

E.

The Employment of Relay Questioning.

In *Stein* v. *New York*, 346 U. S. 156, 184-185, Mr. Justice Jackson remarked that "Of course, such inquiries [police questioning] have limits. But the limits are not defined merely by calling an interrogation an 'inquisition,' which adds to the problem only the emotions inherited from medieval experience."

That kind of caution is applicable here, for petitioner's view now is that he was subject to "relay" questioning by the police and an Assistant State's Attorney. The technique of employing this label in the argument heading, however, while refraining from its use in the body of the argument (Br. 24-25), points up clearly the impropriety of the use of such a label to describe what actually occurred.

Though he does not cite them, petitioner apparently has in mind the conduct of a sort condemned by this Court in such cases as *Ashcraft* v. *Tennessee*, 322 U. S. 143 and *Haley* v. *Ohio*, 332 U. S. 596. In *Ashcraft*, the accused was questioned for a continuous period of thirty-six hours during which, by the testimony of the police themselves, he was questioned by officers in relays because the *police* "became so tired that *they* were compelled to rest." (322 U. S. at 149) (Emphasis added.) In *Haley*, a 15 year old Negro boy was questioned from midnight to dawn by officers working in relays. Certainly, these cases are inapposite.

To show "relay" questioning here petitioner is forced to total all the police officers involved, beginning with those

who made the arrest and including those who had any contact with him at the police station. But this is not the test. The critical inquiry must focus on the manner in which the *questioning* was carried out. And here both petitioner and police are in agreement that "relay" questioning, whatever that term imports, did not occur.

Petitioner testified that a detective who "was an elderly man, medium height, not too heavily built . . . questioned me when I first got into the office." (R. 17). He testified that Officer Montejano made promises to him although he denied making an incriminatory statement to Montejano (R. 17-18). He said that "There were a few police officers that came in and out of the room that asked me questions and told me that I had done it because the other person DiGerlando said I did, and I said I don't know anything about it." (R. 18). He testified that the only time he gave an inculpatory statement was to Assistant State's Attorney Cooper (R. 21).

Detective Montejano testified that the first time he questioned petitioner was about 10:00 P.M.; that petitioner was almost immediately confronted with DiGerlando who accused him of the shooting, and that he and, he believed, Officer O'Malley, questioned petitioner from approximately 10:00 to 10:10 P.M. after which petitioner made a statement to Captain Flynn (R. 10-13). Captain Flynn testified that he first saw petitioner at approximately 10:30 P.M. and that petitioner orally confessed to him (R. 49-51). A written confession was thereafter given to the Assistant State's Attorney at approximately 11:50 P.M. (R. 64).

There is nothing in the evidence, therefore, to substantiate the claim that petitioner was questioned by "relays" of police officers.[12] Since petitioner's sister and, later co-

12. ". . . we have never gone so far as to hold that the Fourteenth Amendment requires a one-to-one ratio between interrogators and prisoners. . . ." *Stein* v. *New York*, 346 U. S. 156, 185.

defendants, DiGerlando and Chan were also being questioned at the same time (R. 98), it would not be out of the ordinary for officers to "come in and out of the room" where petitioner was being held to ask him questions for short periods of time during the course of the evening.

F.

The Legality of Petitioner's Arrest.

As we read the argument, petitioner now claims that his arrest was in violation of two Illinois statutes; that the arrest was therefore "illegal"; that the confession was the "fruit" of the "illegal" arrest and that *Wong Sun* v. *United States*, 371 U. S. 471 bars its use as evidence (Br. 25-27).

It should be made crystal clear, at this point in the argument, just what is, and what is not, at issue.

First, the legality of petitioner's arrest on January 30 is, as we understand it, challenged solely under Illinois law. That was the position taken in the Supreme Court of Illinois and in the Petition for Certiorari. The legality of petitioner's arrest under the Fourth Amendment, or as a matter of federal constitutional law, has never been, and is not properly now in issue.

Second, the record does not demonstate that petitioner's arrest on January 30 was in violation of Illinois law. It is said that it violated Ch. 65, § 26 Ill. Rev. Stat. (1959) which forbids imprisonment, restraint or custody "for the same cause" of one who has been discharged on a writ of habeas corpus. But the statute further provides:

> "The following shall *not* be deemed to be the *same cause*:
>
> 1. If, after a discharge for a *defect of proof*, or any material defect in the commitment, in a criminal

case, the prisoner should be again arrested *on sufficient proof*, and committed by legal process for the same offense.

* * * * *

3. Generally, whenever the discharge has been ordered on account of the non-observance of any of the forms required by law, the party may be a second time imprisoned if the cause be legal and the forms required by law observed." (Emphasis added.)

The record does not reflect what information, if any, the police had when they arrested petitioner 10 days earlier, or upon what state of facts they acted. The record does not reflect the reason for the discharge on habeas corpus. The record does reflect, however, that petitioner was not arrested on January 30 until after DiGerlando, who was then in police custody, had accused him of the murder (R. 30, 100). Since the legality of petitioner's arrest was not challenged at the trial, there is nothing in the record to show that whatever "defect of proof" caused the earlier discharge of petitioner on habeas corpus was still existent on January 30. And since the police had new evidence, e.g., the accusation of DiGerlando, on January 30 which they did not possess at the time of his arrest ten days earlier, the arrest on January 30 did not violate the habeas corpus act.

Petitioner also seeks support from that provision of Ch. 38, § 379 Ill. Rev. Stat. (1959) which forbids imprisonment "for the purpose of obtaining a confession." How far the statute reaches into ordinary police investigation practices is not clear, but certainly the Supreme Court of Illinois, having held in this very case that "The right of the police to interrogate suspects has never been seriously questioned" (R. 129) and "the police have not only the right but the duty to question suspects" (R. 130) and that the police have a "right to a reasonable opportunity to

interrogate outside the presence of counsel" (R. 134), would not find that the statute was violated here.

Third, even assuming that the arrest was illegal under Illinois law, that factor is not one which bears upon the question now at issue—whether petitioner's confession was voluntary or involuntary. Though this court has on occasion noted the fact of an illegal arrest when considering the question of voluntariness,[13] we can perceive no reason why a person who has been arrested "unlawfully" is under more compulsion to confess than is one who has been "lawfully" arrested. If, in fact, the average prisoner appreciates the often fine distinctions between the two cases (and here the question of whether petitioner's second arrest was lawful is extremely technical) then the opposite conclusion, as Professor Kamisar has pointed out, is more likely true.[14]

Fourth, prior to the filing of petitioner's Brief on the merits, no *Wong Sun* argument had ever been raised. Though this cause was not decided on rehearing by the Supreme Court of Illinois until months after this Court's decision in *Wong Sun*, the argument that, apart from the question of voluntariness, the confession is the product of an illegal arrest was not raised in that court. It was not raised, nor was *Wong Sun* even mentioned, in the Petition for Certiorari. Whatever relation an illegal arrest bears to the question of voluntariness, the argument that a confession must be excluded when the "product" of an illegal arrest, without more, is a very different one indeed. That argument is rooted squarely in the Fourth Amendment and does not come into play without allegation and proof of a violation of that provision. *Ker v. California*, 374 U. S.

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13. See *Ward v. Texas*, 316 U. S. 547, 552.

14. Kamisar, *What Is An "Involuntary" Confession?*, 17 Rutgers L. Rev. 728, 751 (1963).

23, 31-34; *Wong Sun* v. *United States*, 371 U. S. 471, 484-486; *Fahy* v. *Connecticut*, 375 U. S. 85, 90-91.

Since it has never been contended that petitioner's arrest on January 30 violated the Fourth Amendment, and since the *Wong Sun* argument only now appears for the first time in the face of this Court's express disapproval of "the practice of smuggling additional questions into a case after we grant certiorari" (*Irvine* v. *California*, 347 U. S. 128, 129), we believe it is not now in issue and that the petitioner's confession cannot be deemed inadmissible on this ground.[15]

G.

The Mental and Emotional Condition of Petitioner.

In his last argument upon the question of voluntariness petitioner makes several points which we believe require but short answer.

First we are told that petitioner's will was overborne largely because he was: (1) "only" twenty-two years of age; (2) of Mexican extraction; (3) had no past history of police contacts; (4) was "emotionally upset" at the police station. *Crooker* is distinguished because of the accused's law school background, while *Gallegos* v. *Colorado* is more eagerly advanced for the proposition that "the mere failure to advise that accused of his rights, absent any other elements of coercion, rendered his statement inadmissible because of his age and experience" (Br. 27-28).

Petitioner was not "only" twenty-two. He was twenty-two. He was not fourteen years of age and a child as was Gallegos. He was, as we have pointed out earlier in this Brief, married and the father of a child. Because the issue of voluntariness was not the prime question raised

15. See Rule 23(1)(c) of this Court; Stern and Gressman, *Supreme Court Practice*, § 6-42, pp. 248-249 (3rd ed. 1962).

by petitioner in the Criminal Court of Cook County (almost all, if not all, reliance being placed upon the denial of counsel during police questioning), the record is necessarily sketchy concerning precise details relevant to petitioner's psychological makeup and degree of maturity. The trial court which observed him firsthand found that his intelligence was impressive, ". . . he certainly is not ignorant by a long stretch of the imagination. He is pretty keen. . . ." (R. 41).

We do not think that any unusual significance can be attached to what petitioner calls his "minority group extraction" (Br. 27). There are no "majority" groups in this country or in the city of Chicago, so far as we are aware, that have descended mysteriously from some neutral stock and, presumably, carry the genes conferring immunity from easy persuasion by police authorities. There is no evidence that petitioner is foreign born as was the defendant in *Spano* v. *New York*, 360 U. S. 315. And while there is no evidence here that petitioner has any sort of police record, his several prior contacts with the police during the course of their investigation of the Valtierra murder, including a period of 15 hour detention which produced no confession, militate against the conclusion that he was easily overreached, especially when his repeated pre-arrest consultations with counsel are taken into account. Indeed, petitioner testified that when he heard that a warrant had been issued for his arrest he *voluntarily surrendered* to police authorities, sometime after the fifteen hour detention, and prior to his arrest on January 30, only to be sent away by a kindly police sergeant who told him he "shouldn't even be there" (R. 84).

Captain Flynn testified that petitioner was "nervous and agitated" at the time Flynn talked to him. Petitioner also told Flynn that the reason for his nervousness and agitation was his part in the Valtierra murder (R. 50). As the

Supreme Court of New Jersey has pointed out, "An interrogation, no matter how conscientiously conducted, is naturally bound . . . to evoke . . . nervouness . . . which will be heightened in a person who knows he is guilty by consciousness of guilt. . . ." *State* v. *Smith*, 161 A. 2d 520, 546.[16]

Finally, petitioner seeks to further distinguish *Crooker* on the ground that in that case "there was no contention of any causal relationship between [the denial of counsel] and the subsequent [confession]" (Br. 28). This is not so. In fact, the *Crooker* opinion expressly noted that "Petitioner's claim of coercion, then, depends almost entirely on denial of his request to contact counsel." 357 U. S. at 437-438.

To sum up, it is our belief that, taking into consideration all of the asserted circumstances which it is claimed bear upon the voluntary nature of the confession, this Court will not find that they are "irreconcilable with the possession of mental freedom" by petitioner. (*Ashcraft* v. *Tennessee*, 322 U. S. 143, 154.) We have here a twenty-two year old, married man, the father of a child, the beneficiary of extraordinary pre-arrest counseling by an attorney, and as is conceded upon this argument, one who, fully aware of his constitutional rights upon entering the station, confessed shortly after arrest, with the knowledge that a co-defendant had apparently confessed and was implicating him, and that others involved in the offense were then being questioned.[17] Ten days prior to the arrest he had undergone 15 hours of police custody without confession. After that experience he at one time voluntarily sought to place himself back into police custody when he thought a warrant

16. And see *Stein* v. *New York*, 346 U. S. 156, 185-186.

17. "That confession came at a time when he must have known that the police already knew enough . . . to make his implication inevitable. Stein held out until after Cooper had confessed and implicated him." *Stein* v. *New York*, 346 U. S. 156, 186 (and ft. 29.)

had been issued for his arrest. A close scrutiny of the original record containing petitioner's verbatim testimony on the motion to suppress the confession, and at the trial will reveal the deliberate, literate, and rational manner of the man.

Assuredly this Court "cannot escape the demands of judging or of making the difficult appraisals inherent in determining whether constitutional rights have been violated." We, however, believe that the resolution of this case is not difficult, and that this Court will be "impelled to the conclusion, from all of the facts presented, that the bounds of due process have [not] been exceeded." *Haynes* v. *Washington*, 373 U. S. 503, 515.

II.

THE RIGHT TO COUNSEL PROTECTED BY FOURTEENTH AMENDMENT DUE PROCESS DOES NOT EXTEND TO POST-ARREST QUESTIONING BY POLICE AND A CONFESSION, OTHERWISE VOLUNTARY, WHICH IS GIVEN AFTER THE OPPORTUNITY TO CONSULT WITH COUNSEL HAS BEEN REFUSED IS ADMISSIBLE IN STATE CRIMINAL TRIALS.

> *"I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved. To be sure, the courts decide, or should decide, only the case they have before them. But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply? Is it not the very essence of judicial method to insist upon attending to such other cases, preferably those involving an opposing interest, in evaluating any principle avowed?"*[18]

18. Wechsler, *Principles, Politics and Fundamental Law*, 21 (1961).

This case squarely raises "the most pervasive question in the field of constitutional-criminal procedure today."[19] When does the right of counsel, protected against state deprivation by the due process clause of the fourteenth amendment, begin? And once that is settled, two more questions must be answered. Are there rights to the aid of retained counsel protected from state deprivation by due process of law that the state need not affirmatively furnish to the indigent defendant? If the right to counsel begins at the moment of arrest, what are the consequences of its violation?

The facts which raise the issue here are not essentially in dispute. Petitioner was arrested by the Chicago police on a charge of murder sometime after 8:00 P.M. on January 30, 1960. He arrived at central police headquarters between 9:30 and 9:45 P.M. In the squadcar on the way to the station petitioner denied any knowledge of the crime and at the station he continued his denials. He said that he wished to consult his attorney before making any statement. Shortly after petitioner arrived at the station his attorney, Warren Wolfson, appeared and requested permission to see petitioner who had retained him sometime previously in connection with a civil matter and had consulted with him on the pending homicide investigation. The police refused to allow Wolfson to see petitioner on the ground that he had been in custody only a short time and they had not completed their questioning. Through an open door Wolfson signaled to defendant not to talk—and then left the station. Shortly after 10:00 P.M., petitioner gave an oral statement to detective Montejano accusing one Benedict DiGerlando of the killing, orally confessed to Chief Flynn at about 10:30 P.M. and gave

19. Kamisar and Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 Minn. L. Rev. 1, 33 (1963).

a full written confession to an Assistant State's Attorney and his court reporter at about 11:30 P.M.

The thrust of petitioner's argument is this:

(1) the police have no "right" to question an accused following his arrest because of the federal privilege against self-incrimination and the Illinois statutory and federal constitutional rights to counsel (Br. 37);

(2) the exercise of this asserted "right" by the police after the accused, or retained counsel, has requested consultation with the other violates due process and any confession which is the product of such questioning is inadmissible in a state criminal trial. (Br. 37-42.)

We think petitioner's focus is wrong. We are not here concerned with the "rights" of the police, whatever they are and from wherever they flow. We think the essential concern is whether any federal constitutional right of the defendant has been abridged by the state action in this case. For if there is no constitutional warrant for overturning the state action questioned here, the "value choice" Illinois has made in allowing police interrogation following arrest, and in the absence of counsel, "must, of course, survive" without reference to the question of whether there is "authority for" or "the right to" such action on the part of the state authorities.[20]

At the outset, let it be clear that we are not here concerned with the fifth amendment privilege against self-incrimination, for that guarantee is not now enforceable against the states,[21] and we do not understand petitioner to contend to the contrary. Nor are the rights of counsel recognized by the Illinois statutory and constitutional provisions discussed by petitioner (Br. 12-13, 37) relevant to

20. Wechsler, *Principles, Politics and Fundamental Law*, 27 (1961).

21. *Twining* v. *New Jersey*, 211 U. S. 78; *Adamson* v. *California*, 332 U. S. 46; *Palko* v. *Connecticut*, 302 U. S. 319.

this argument for they have been authoritatively construed by the Supreme Court of Illinois not to foreclose the police conduct under scrutiny.[22]

A.

When Does the Right to Counsel Begin?

This Court has never held that the right to counsel protected by the fourteenth amendment attaches at the moment of arrest. We believe that in *Crooker* v. *California*, 357 U. S. 433 and *Cicenia* v. *LaGay*, 357 U. S. 504, this Court rejected the argument that it does.

In *Crooker*, Mr. Justice Clark stated the issue in this manner:

> "Petitioner reaches this position by reasoning *first* that he has been denied a due process right to representation and advice from his attorney, and secondly that the use of any confession obtained from him during the time of such a denial would itself be barred by the Due Process Clause, even though freely made. We think petitioner *fails to sustain the first point*, and therefore we do not reach the second." 357 U. S. at 438-439 (Emphasis added.)

If there is any question that this is not a holding that the right to counsel protected by due process does not attach from the moment of arrest, surely it should be put to rest by the very explicit language of Mr. Justice Harlan for the majority in the companion case of *Cicenia*:

> "The contention that petitioner *had a constitutional right to confer with counsel* is disposed of by *Crooker* v. *California*. . . . . In contrast, petitioner would have us hold that *any* state denial of a defendant's request to confer with counsel during police questioning violates due process, irrespective of the particular circum-

22. (R. 133.) And see *Powell* v. *Alabama*, 287 U. S. 45, 59-60.

> stances involved. Such a holding, in its ultimate reach, would mean that state police could not interrogate a suspect before giving him an opportunity to secure counsel." 357 U. S. at 508-509 (Emphasis added.)

Since both *Crooker* and *Cicenia* were capital cases, where the right to counsel was absolute and not dependent upon the "special circumstances" test of *Betts* v. *Brady*, 316 U. S. 455, we conclude that the essence of the Court's holdings in *Crooker* and *Cicenia* was that the right did not attach at the moment of arrest, although, as Mr. Justice Harlan remarked, "it is generally quite unclear in state law when the right to have counsel begins."

It is true that this Court also said in *Crooker* that "state refusal of a request to engage counsel violates due process . . . if the accused . . . is deprived of counsel for any part of the pretrial proceedings." However, a canvass of the cases announcing this principle fails to show that the Court has ever considered mere post-arrest interrogation to fall within the concept of "pre-trial" *proceedings*.

We begin with the fountainhead of the right to counsel cases—*Powell* v. *Alabama*, 287 U. S. 45. In *Powell*, defendants who were strangers to the community were rushed to trial in a capital case without the effective assistance of counsel. In his now famous and much quoted discussion of the right to counsel, Mr. Justice Sutherland concluded that a defendant "requires the guiding hand of counsel at *every step* in the *proceedings* against him." While of course this language may be read broadly to reach every citizen contact with the world of law enforcement; we believe that an earlier passage in the opinion illustrates what Justice Sutherland meant to include within that phrase:

> "In any event, the circumstance lends emphasis to the conclusion that during perhaps the most critical period of the *proceedings* against these defendants, that is to say, *from the time of their arraignment until*

> *the beginning of their trial*, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during *that period* as at the trial itself." 287 U. S. at 57 (Emphasis added.)

One of the state cases cited with approval in support of this holding, *Batchelor* v. *State*, 125 N. E. 773 (Ind. 1920), is illustrative here. In *Batchelor*, the defendant was arrested and held incommunicado for five days. On the fifth day he was indicted and brought into court and arraigned. After pleading guilty and testifying at the arraignment, defendant was sentenced to death on the following day. All of these proceedings were had in the absence of counsel, although the defendant had requested the opportunity to consult with counsel soon after his arrest and while he was confined. The Supreme Court of Indiana held, as in *Powell*, that the right to counsel extended to "every stage of the proceedings" and voided the plea of guilty entered by the defendant at the arraignment and held involuntary a *judicial confession* given by the accused after pleading guilty. The confession was so labeled because:

> "The evidence was self-incriminating in its character and was not voluntarily given by appellant. It was given while he was in the custody of officers of the law *after he had been charged with the commission of a crime*. He was not advised as to his constitutional rights on the subject before he *testified*, and he had not been permitted to consult with counsel so as to be informed as to what his rights on the subject were. It has been frequently held that incriminating evidence elicited from an accused person under such circumstances is not voluntarily given." 125 N. E. at 778 (Emphasis added.)

The rationale and holdings of *Batchelor* characterize and delimit, we believe, the broad dictum of Justice Suther-

land in the *Powell* case. The "proceedings" during which the constitution protects and enforces the right to counsel begin at the invocation of the judicial process against the prisoner, and although the decisions have not been uniform, may include the period following the return of the indictment. (*Spano* v. *New York*, 360 U. S. 315, 324, 326, *concurring opinions*); the preliminary hearing (*White* v. *Maryland*, 373 U. S. 59); the arraignment (*Hamilton* v. *Alabama*, 368 U. S. 52) and pre-trial pleas of guilt (*House* v. *Mayo*, 324 U. S. 42; *Moore* v. *Michigan*, 355 U. S. 155; cf. *Chandler* v. *Fretag*, 348 U. S. 3.)

The concurring opinions in *Spano* v. *New York*, 360 U. S. 315 very sharply point up the difference between the question of the right to counsel before and the right to counsel after the invocation of the judicial process. Thus Mr. Justice Douglas was careful to note that:

> "We have often divided on whether state authorities may question a suspect for hours on end when he has no lawyer present and when he has demanded that he have the benefit of legal advice. * * * But here we deal not with a *suspect* but with a man who has been *formally charged* with a crime. The question is whether *after the indictment* and *before the trial* the Government can interrogate the accused in secret when he asked for his lawyer and when his request was denied. * * * We do not have here mere suspects who are being secretly interrogated by the police. . . ." 360 U. S. at 324-326. (Emphasis added.)

And Mr. Justice Stewart said:

> "Let it be emphasized at the outset that this is not a case where the police were questioning a suspect in the course of investigating an unsolved crime (citing *Crooker* and *Cicenia*). When the petitioner surrendered to the New York authorities he was under indictment for first degree murder." 360 U. S. at 327.

Though not involving post-arrest questioning by police authorities, *Re Groban*, 352 U. S. 330, is additional support for the proposition that such questioning in the absence of counsel is constitutionally permissible. In *Groban*, this Court upheld, under penalty of contempt, the power of a state to require persons to be sworn as witnesses at a hearing before a state fire marshal and to testify without the aid of counsel. The opinion for the Court is clear that the marshal conducts such a proceeding:

> "Solely to elicit facts relating to the causes and circumstances of the fire. The Fire Marshal's duty was to 'determine whether the fire was the result of carelessness or design,' and to *arrest* any person against whom there was sufficient evidence on which to base a charge of arson" 352 U. S. at 332. (Emphasis added.)

The Court then held:

> "The fact that appellants were under a legal duty to speak and that their testimony might provide a basis for criminal charges against them does not mean that they had a constitutional right to the assistance of counsel. Appellants here are witnesses from whom information was sought as to the cause of the fire. * * * Obviously in these situations evidence obtained may possibly lay a witness open to criminal charges. When such charges are made in a criminal proceeding, he then may demand the presence of his counsel for his defense. Until then his protection is the privilege against self-incrimination. * * * This is a privilege available in investigations as well as in prosecutions." 352 U. S. at 332-333.

The *Groban* holding is, we believe, controlling here. After the murder of Manuel Valtierra, it was the duty of the Chicago police to conduct an investigation to "elicit facts relating to the cause and circumstances of the [homicide.]" It was also their duty to prefer a *charge* against "any person against whom there was sufficient evidence on which to base a *charge* of [murder.]" Petitioner was a witness

"from whom information was sought as to the cause of the [homicide.]" Evidence obtained through police questioning did lead to the preference of a charge against petitioner and when such a charge was made he obtained "the presence of counsel for his defense." And during the period of police questioning "his protection [was] the privilege against self-incrimination."

Unlike *Groban*, however, petitioner was not compelled to speak at police headquarters. He could have availed himself of the privilege merely by refusing to answer questions. That he did not, that he voluntarily confessed, with full knowledge of his privilege which, as Mr. Justice Frankfurter has said, "has attained the familiarity of the comic strips,"[23] is not a fault of the state cognizable under the due process clause.

In *Anonymous* v. *Baker*, 360 U. S. 287, decided after *Groban*, *Crooker*, and *Cicenia*, this Court once again reaffirmed the rule that due process does not compel the state to allow or furnish the aid of counsel in the investigation stage prior to the filing of criminal charges against a person under questioning. Our reading of *Crooker* and *Cicenia*—that the due process right of counsel does not extend to post-arrest interrogation—was expressly confirmed by Mr. Justice Harlan:

> "Although we have held that in state criminal proceedings . . . a defendant has an unqualified right to be represented at trial by retained counsel, *Chandler* v. *Fretag*, 348 U. S. 3, 99 L. Ed. 4, 75 S. Ct. 1, *we have not extended that right to the investigation stages of such proceedings.* See *Cicenia* v. *La Gay*, . . . see also *Crooker* v. *California*. . . . " 360 U. S. at 294 (Emphasis added.)

We conclude, therefore, that it is the present view of this Court that the denial of counsel during post-arrest

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23. *Re Groban*, 352 U. S. 330, 337 (concurring opinion).

police questioning is not a denial of the right to counsel protected by the due process clause (*Cicenia* v. *La Gay*, 357 U. S. 504; *Crooker* v. *California*, 357 U. S. 433; *Re Groban*, 352 U. S. 330; *Anonymous* v. *Baker*, 360 U. S. 287)[24] although the lack of counsel during this period is one factor to be taken into account in determining the voluntariness of a confession (*Haley* v. *Ohio*, 332 U. S. 596; *Gallegos* v. *Colorado*, 370 U. S. 49; *Haynes* v. *Washington*, 373 U. S. 503) or the fundamental fairness of the totality of the state criminal proceedings culminating in the conviction. *Crooker* v. *California*, 357 U. S. 433.

If *Cicenia* is the law, then petitioner's claims cannot be distinguished from those raised in *Cicenia*. In both cases:

(1) petitioner was in his early twenties;

(2) petitioner conferred with retained counsel before being taken into custody;

(3) petitioner requested the opportunity to confer with counsel during the interrogation;

(4) counsel was present at the police station during the interrogation and was refused admittance;

(5) petitioner confessed in the absence of counsel.

If *Cicenia* is still *to be* the law, therefore, petitioner's argument here must be rejected, as he candidly admits by requesting this court to overrule that decision (Br. 42). We turn then to a consideration of that question.

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24. Inbau and Reid, *Criminal Interrogation and Confessions*, 171-172 (1962); Beaney, *Right To Counsel Before Arraignment*, 45 Minn. L. Rev. 771, 777 (1961).

B.

The Brief of Amicus Curiae.

With the permission of all parties, the American Civil Liberties Union has filed an *amicus* brief urging reversal and the overruling of *Crooker* v. *California* and *Cicenia* v. *LaGay*. The position of the *amicus*, however, is not consistent throughout the Brief. They urge first "the necessity of securing to *all persons* suspected or accused of crime the right to consult with counsel at every stage in the course of criminal proceedings from arrest through final judgment and appeal." (*Amicus* Br. 1) (Emphasis added.) They then request this Court to hold that "a confession obtained during police interrogation of a suspect in custody following their denial *of his request* to consult counsel is inadmissible in evidence under the due process clause . . . [because interrogation] . . . under these circumstances is *inherently coercive*. . . ." (*Amicus* Br. 3) (Emphasis added.) The scope of the requested ruling is later limited, however, to the case "where a prisoner suspected of a *capital crime* has been denied access to counsel . . ." (*Amicus* Br. 9-10, 14) (Emphasis added.)

Any answer to *amicus* upon the points set forth above would, of course, merely duplicate our answer to petitioner in other parts of this Brief. In the main, however, the brief for the *amicus* is devoted to excerpting and discussing interrogation techniques recommended for police investigators by recently published manuals purportedly incorporating "the interrogation practices which are in actual use by American police today" and "which are accepted as lawful and proper under the best current standards of professional police work." (*Amicus* Br. 4).

Any detailed examination and comment on all of

the tactics set forth in the manuals would be at once unnecessary and unjustified in terms of the space and time required for such a reply. Suffice it to say that there is no evidence in this record to show that the Chicago police generally employ the tactics objected to or that the more disquieting ones were employed against petitioner in this case. Of course private questioning of suspects in police custody lends itself to occasional police abuse (Cf. *Haynes* v. *Washington*, 373 U. S. 503, 514). But a sufficient answer to this is, as the Supreme Court of Illinois held below, that if "the police abuse their right to interrogate, the confession will be excluded." (R. 131).

By declining to engage in extended discussion concerning the interrogation techniques which *amicus* advances as sufficient reason to bar *all* police questioning, no matter how reasonable, in the absence of counsel, we do not wish to be understood as necessarily condoning any or all of them. Some are patently illegal and coercive, e.g., "securing the suspect's knees between the legs of the interrogator, holding the suspect's chin so that the interrogator can stare directly into his eyes"; ". . . shout a pertinent question and appear as though he [the interrogator] is beside himself with rage" (*Amicus* Br. 7); the use of the "reverse lineup" to the point where the suspect becomes "desperate"; to "interrogate steadily and without relent, leaving the subject no prospect of surcease . . . [the interrogator] . . . must dominate his subject and overwhelm him with his inexorable will . . . in a serious case, the interrogation may continue for days . . ." (*Amicus* Br. 8). Others may, in some instances, and in combination with other factors, be open to question in view of recent decisions of this Court, e.g., "The use of pretended sympathy and other emotional appeals . . ." (*Amicus* Br. 6). See *Spano* v. *New York*, 360 U. S. 315, 323.

C.

The Views of the Commentators.

Six years have elapsed since the *Crooker* and *Cicenia* decisions were handed down by this Court. Considering the passage of time, and the fact that three of the five Justices composing the majority no longer serve on the Court,[25] while of the four Justices in the minority all still serve, it would be surprising if considerable speculation over the continuing validity of *Crooker* and *Cicenia* had not accrued by now. And of course it has.

Even petitioner could not resist the urge to warn the Supreme Court of Illinois, in his answer to the Petition for Rehearing below, that it would affirm his conviction at the risk of being reversed because this "Court has not yet, since the retirement of three Justices who participated in that majority opinion [*Crooker*] had occasion to reconsider whether the . . . doctrine should continue to be applied in preference to the . . . rule espoused by the minority, all of whom remain on the bench today" (R. 122). Petitioner predicted that since "three Justices who were not present on the Court when it decided *Crooker* v. *California* (Justices Stewart, White and Goldberg) all joined in Mr. Justice Black's opinion [in *Gideon* v. *Wainwright*, 372 U. S. 335] without reservation . . . it is manifest . . . that the . . . result [reached by the *Crooker* minority] would . . . obtain when the Court will be faced with the problem posed by the case at bar" and that "the fate of *Crooker* v. *California* will be the same as the fate of *Betts* v. *Brady*, i.e., it will be reversed . . ." (R. 123-124).

In a final warning, the Supreme Court of Illinois was bluntly told that they "should not allow this opportunity,

25. Justices Frankfurter, Burton and Whittaker.

voluntarily to adopt the benevolent and just rule [petitioner's rule] to evaporate only to later be forced to accept it when the highest judicial authority in the land so commands" (R. 124).

Of course, such bold predictions would be unseemly and inappropriate to the pleadings here and petitioner, in his Brief, has quietly retreated from, to put it irreverently, counting his votes in this Court before they are hatched. The State of Illinois ventures no such speculations as to how the vote would be cast today. But some of the liberal commentators have not, in large measure, been so restrained, and now foresee easy reversal of *Crooker* and *Cicenia*.

Professor Broeder, for example, has said:

> "Accordingly, since *Wong Sun* gives *McNabb-Mallory* constitutional status in relation to both the states and the federal government in an opinion in which Mr. Justice Goldberg joined, it would be equally difficult for Mr. Justice Goldberg to draw the distinction [between *Mallory* and *Cicenia*] in constitutional terms assuming, which is difficult to believe, that he might wish to. This point, plus the overruling of *Betts* by *Gideon*, virtually compels the conclusion that the dissenting opinions in *Crooker* and *Cicenia* represent the view of a majority of the Court's present membership and that, at the least, due process now requires the exclusion of any confession obtained in the *absence of* counsel when a defendant has *requested* that one be *present* during the questioning. * * * Nor is it clear that any such request need be made by the defendant, or that the present Court would require one. Certainly none should be. . . ."[26]

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26. Broeder, *Wong Sun v. United States, A Study in Faith and Hope*, 42 Neb. L. Rev. 483, 606-607 (1963) (Emphasis added.) See also: Note, *Right To Counsel During Police Interrogation*, 16 Rutgers L. Rev. 573 (1962); King, *Developing A Future Constitutional Standard For Confessions*, 8 Wayne L. Rev. 481, 495 (1962).

We believe, however, that such exceedingly assumptive forecasts are unwarranted.

In the first place, it is easy enough to cull isolated *dictums* and phrases from the recent opinions of this Court to come to precisely the opposite view. For example, Mr. Chief Justice Warren, a member of the *Crooker* and *Cicenia* minorities, declined to reach a similar, but less far-reaching, result in *Spano* v. *New York*, 360 U. S. 315, 320. And Justices Douglas, Black and Brennan found some reason to distinguish *Crooker* from *Spano*, while Mr. Justice Stewart took pains to "let it be emphasized at the outset that this [*Spano*] is not a case where the police were questioning a suspect in the course of investigating an unsolved crime." (360 U. S. at 327.) For another example, Mr. Justice Goldberg, speaking for a majority of the Court in *Haynes* v. *Washington*, 373 U. S. 503, 515, was careful to say that "certainly, we do not mean to suggest that *all* interrogation of witnesses and suspects is impermissible. *Such questioning is undoubtedly an essential tool in effective law enforcement.* The line between proper and permissible police conduct and techniques is, at best, a difficult one to draw . . . ." (Emphasis added.)

All we mean to say by this review is that we believe that at least this court will re-examine the question in the light of, and with regard to, not only the facts of this case, but, in larger measure, the inevitable results of any decision overruling *Crooker* and *Cicenia*. For, if they go by the boards, they will not go easily. On the one hand, this Court must always maintain its duty to "exercise [a] judgment upon the whole course of [state] criminal proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward

those charged with the most heinous offenses."[27] And though "the State courts have the responsibility for securing the rudimentary requirements of a civilized order, in discharging that responsibility there hangs over them the reviewing power of this Court . . . [and when] . . . appeal is made to it, there is no escape."[28] On the other hand, "The nature of the duty . . . makes it especially important to be humble in exercising it. Humility in this context means an alert self-scrutiny so as to avoid infusing into the vagueness of a constitutional command one's merely private notions. Like other mortals, judges, though unaware, may be in the grip of prepossessions."[29]

Given these considerations; applying them especially to a case involving the issue of confessions,[30] we believe the Court will realize that in the kind of constitutional determination it faces here, "issues . . . are inescapably 'political'—political in the . . . sense that . . . they involve a choice among competing values or desires, a choice reflected in the legislative or executive action in question, which the [C]ourt must either condemn or condone" and that the choice must be made in full recognition of the "vital difference between legislative freedom to appraise the gains and losses in projected measures and the kind of principled appraisal, in respect of values that can reasonably be asserted to have constitutional dimension, that alone is the province of the [Court]."[31]

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27. *Malinski* v. *New York*, 324 U. S. 401, 412, 416-417 (concurring opinion).

28. *Watts* v. *Indiana*, 338 U. S. 49, 50.

29. *Haley* v. *Ohio*, 332 U. S. 596, 601, 602 (concurring opinion).

30. "As in all such cases, we are forced to resolve a conflict between two fundamental interests of society; its interest in prompt and efficient law enforcement, and its interest in preventing the rights of its individual members from being abridged by unconstitutional methods of law enforcement." *Spano* v. *New York*, 360 U. S. 315.

31. Wechsler, *Principles, Politics And Fundamental Law*, 22 (1961).

But if decision here is to be inevitably abandoned to an extension of the right to counsel so that it begins at the moment of arrest as—the liberal commentators prophesy, because the votes for overturning *Crooker* and *Cicenia* are thought by them to now be there—let it at once be clear what such a decision means.

D.

What Gideon v. Wainwright and Related Cases Compel.

The decision, of course, means the end of confessions as a tool of law enforcement. It cannot be stated more plainly than that. For once this petitioner's claim with Illinois is settled, the inevitable progression of the law must follow:

First, if the right to counsel attaches at the moment of arrest, if, as the dissent in *Crooker* expressed it, the "demands of our civilization expressed in the Due Process Clause require that the accused who wants a counsel should have one at any time after the moment of arrest" (357 U. S. at 448), then it can hardly be denied that this right must be available to the poor as well as to the rich. For "the further you push back the right to counsel for the one who can afford it, the wider the disparity in treatment between him and the man who cannot. If . . . fundamental fairness does require that the person who can afford a lawyer must be given one at any time after his arrest, how in the world can you continue to deny counsel to the indigent at that stage and each and every subsequent stage?"[32] If petitioner was entitled to counsel immediately upon being taken into custody on January 30, then so is every defendant. Any other conclusion is foreclosed by

32. Kamisar, *The Right To Counsel And The Fourteenth Amendment: A Dialogue On "The Most Persuasive Right" Of An Accused*, 30 U. Chi. L. Rev. 1, 9 (1962).

the opinions of this Court in *Gideon* v. *Wainwright*, 372 U. S. 335 and *Griffin* v. *Illinois*, 351 U. S. 12.

Second, if indigent criminal defendants are entitled to counsel from the moment of arrest, then already established law makes it clear that such a right does not depend upon a request. In other words, not only must the state furnish counsel to the indigent defendant at this stage of the criminal proceeding, it must make make sure that he does not waive the right through ignorance of its existence, for "it is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend upon a request." *Carnley* v. *Cochran*, 369 U. S. 506, 513.

Given these two holdings—which must inexorably follow the overruling of *Crooker* and *Cicenia*—we may pause to examine the consequences to law enforcement which can easily be foreseen even at this juncture:

(1) "To push the right to counsel back to the point of arrest and to exclude all incriminating statements obtained from an uncounselled defendant any time thereafter as a product of a fourteenth amendment violation would be, in effect, to impose the *McNabb-Mallory* rule on the states."[33] Indeed, it would be to go beyond the *Mallory* rule which forbids the admission in evidence only those statements taken during a period of unlawful detention which may not, in any given case, begin at the moment of arrest.

(2) It throws onto the police the terrible administrative burden of determining who qualifies as an indigent entitled to the appointment of counsel by the state. It may also saddle the police with the task of appointing counsel in the squadcar or at the precinct station at any hour of the day or night.

(3) Since no confession may be taken in the absence

33. Kamisar, *The Right To Counsel And The Fourteenth Amendment: A Dialogue On "The Most Persuasive Right" Of An Accused*, 30 U. Chi. L. Rev. 1, 11 (1962).

> of counsel, and since no competent counsel will allow his client to confess (especially would this be true in the case of appointed counsel whose failings are laid to the state), if only to avoid the ever increasing risk of having his competency attacked on another day and in another forum, it means simply that police questioning of suspects, indispensable to law enforcement, is at an end.

We could, of course, pursue further the logical progression of the consequences of overruling *Crooker* and *Cicenia*. Though this Court could not imagine in 1958, for example, that "Refusal by state authorities of the request to contact counsel necessarily would then be an absolute bar to conviction,"[34] it has, since that time, and based largely upon the rationale of the *Crooker* dissent, been so held by a Connecticut appellate court in *State* v. *Krozel*, 24 Conn. Supp. 266, 190 A. 2d 61. And because the newly extended right to counsel would, in all probability, be held to apply to those convictions occurring before the decision in this case, and taking into account the rule that severely limits the doctrine of waiver in preventing relief through the remedy of habeas corpus in the federal courts,[35] the extent to which all existent convictions of indigent defendants who were without counsel from the moment of arrest would now be in serious jeopardy—at least in those cases where a confession was the product of police interrogation in the absence of counsel—can easily be imagined.

Something should be said about the decision of the New York Court of Appeals in *People* v. *Donovan*, 193 N. E. 2d 628, upon which petitioner most heavily relies (Br. 38-42). It is true that *Donovan* finds violations of the New York right to counsel provisions and the New York privilege against self-incrimination involved in the taking of a confession after a defendant has requested, and been

34. *Crooker* v. *California*, 357 U. S. 433, 441.

35. *Fay* v. *Noia*, 372 U. S. 391, 438-440.

denied, counsel. The court was sharply split—it adopted the new rule by the margin of one vote, the majority expressly rejecting the opinion of the Supreme Court of Illinois in the *Escobedo* case. What the resulting impact on law enforcement in that state will be should be determined in short order. But at least this much is clear. The decision was a matter of free choice for the courts of New York. It was not compelled by federal due process.

When this Court adopted *Mapp* v. *Ohio*, 367 U. S. 643, predictable outcries were heard from prosecutors and police of non-exclusionary rule states that their law enforcement processes had suffered a most grievous blow. And yet those voices were muted even before they began, because of the simple fact that for a number of years approximately half the states of this union have followed the exclusionary rule without critical loss in police effectiveness. Before this Court adopted *Gideon* v. *Wainwright*, 372 U. S. 335, the voices of several states were heard in protest that their established systems of criminal law enforcement would suffer irreparably. And yet twenty-two states, including Illinois, joined as *amici curiae* to urge the extension of the right to counsel for indigent prisoners to all felony cases.

A rule establishing the right to counsel at the moment of arrest, however, stands upon a much different footing. We believe, with Justice Walter Schaefer of the Supreme Court of Illinois, that due process "includes those procedures that are fair and feasible in the light of then existing values and capabilities."[36] Extension of the right to counsel back to the moment of arrest is neither fair nor feasible at this moment in the administration of criminal justice in the fifty states. This Court may, by the adoption of such a rule, outlaw confessions. But the police will not abandon their practice of questioning suspects after arrest

36. Schaefer, *Federalism And State Criminal Procedure*, 70 Harv. L. Rev. 1, 6 (1956).

and before arraignment. And not because of any disrespect for this Court and its teachings, but simply because society will not let them, because society cannot let them. The "deeply rooted feelings of the community"[37] will demand that those who murder and rape and would escape unknown—but for the confession following arrest—be at least unmasked though they may go unwhipped of justice.

Petitioner concludes that "The most persuasive brief that could be proposed by petitioner has already been written .... [in] the opinion filed in *Crooker* v. *California* on behalf of the four dissenting justices . . ." (Br. 37). We find ourselves in the same position. The best argument that can be made for the affirmance of this conviction was made in 1949, almost 15 years ago. Mr. Justice Jackson said then:

> "I suppose no one would doubt that our Constitution and Bill of Rights, grounded in revolt against the arbitrary measures of George III and in the philosophy of the French Revolution, represent the maximum restrictions upon the power of organized society over the individual that are compatible with the maintenance of organized society itself. They were so intended and should be so interpreted. It cannot be denied that, even if construed as these provisions traditionally have been, they contain an aggregate of restrictions which seriously limit the power of society to solve such crimes as confront us in these cases. Those retrictions we should not for that reason cast aside, but that is good reason for indulging in no unnecessary expansion of them.
>
> I doubt very much if they require us to hold that the State may not take into custody and question one suspected reasonably of an unwitnessed murder. If it does; the people of this country must discipline themselves to seeing their police stand by helpless while those suspected of murder prowl about unmolested. Is it a necessary price to pay for the

37. *Haley* v. *Ohio*, 332 U. S. 596, 601, 604 (concurring opinion).

fairness which we know as 'due process of law'? And if not a necessary one, should it be demanded by this Court? I do not know the ultimate answer to these questions; but, for the persent, I should not increase the handicap on society." *Watts* v. *Indiana*, 338 U. S. 49, 61-62. (Concurring opinion.)

Criminal defendants, rich as well as poor, enjoy more protection from unjust conviction today than at any time in our history. "The terrible engine" of the criminal law has been repeatedly braked by this Court, by state courts and legislatures and by fair and honest administration of the law by prosecutors and police. We need now to guard against its derailment.

To be sure, Danny Escobedo would not have confessed had he been allowed to consult his attorney at the police station. But then, had he consulted with his attorney beforehand, he would not have murdered Manuel Valtierra either. "Someday perhaps, if and when we are living in the best of all worlds (or at least a better one), rich and poor alike will be offered the services of a lawyer immediately after arrest."[38] Someday too, perhaps, if and when we are living in the best of all worlds (or at least a better one), men will not, in the dead of night and in the eyes of God only, murder their fellow men.

38. Kamisar, *The Right To Counsel And The Fourteenth Amendment: A Dialogue On "The Most Persuasive Right" Of An Accused*, 30 U. Chi. L. Rev. 1, 11 (1962).

CONCLUSION.

Because petitioner's confession was obtained without coercion of any sort, the judgment of the Supreme Court of Illinois should be affirmed and this Court should reaffirm its holdings in *Crooker* v. *California*, 357 U. S. 504 and *Cicenia* v. *LaGay*, 357 U. S. 433, holding that the right to counsel does not begin at the moment of arrest by the command of due process.

Respectfully submitted,

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